TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 452

RICHBOURG MOTOR COMPANY, INTERVENOR, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 21, 1929

CERTIORARI GRANTED DECEMBER 2, 1929

(34,583)

(34,583)

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[fols. a-1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NORTH CAROLINA, AT ASHEVILLE

District Court No., 718

UNITED STATES OF AMERICA, Libelant,

v.

ONE FORD COUPE, Motor #14,444,150, License #325,980

LIBEL—Filed Mar. 3, 1927

To the Honorable E. Y. Webb, Judge of said Court:

The libel of the United States of America, a corporation sovereign, by Frank A. Linney, its attorney in and for the [fol. 2] Western District of North Carolina, respectively represents:

That on the 22 day of February, 1927, the Federal Prohibition Administrator for the Eighth Prohibition Division which includes the State of North Carolina seized from the possession of Ruth Bryson, H. C. Collins, and Jessie Neal, at Asheville, N. C., in Henderson County, in the district aforesaid, one Ford Coupe Automobile, Motor #14,444,150, and 12 1/8 gallons of illicit whiskey contained in—, which said whiskey was destroyed; and the said Federal Prohibition Administrator now holds the said automobile in the Garage of the Davis Motor Co., Hendersonville, N. C., *North Carolina*, within the jurisdiction of this Honorable Court, subject to forfeiture to the United States for causes propounded as follows:

That on the 22 day of February A. D., 1927, in the Western District of North Carolina, Ruth Bryson, H. C. Collins and Jessie Neal, without having paid the tax thereon and with intent to defraud the United States thereof, did use the said Ford Coupe Automobile in the removal and for the deposit and concealment of goods and commodities, to-wit, 12⅛ gallons of illicit whiskey, contained in —, for and in respect whereof a tax is imposed, and had become due and payable under Section 600 of the Revenue Act of 1921 (42 Statutes at large 285), contrary to the form of the Statute in such case made and provided, and against the peace and

dignity of the United States, and particularly contrary to Section 3450 of the Revised Statutes of the United States.

The Attorney for the United States saith that all and singular the premises are true and within the jurisdiction of this Honorable Court, and by reason thereof, and by force of the statute in such case made and provided, the above named automobile became and is subject to forfeiture.

Wherefore, your libelant prays that due process issue in that behalf, as well as of attachment, to bring the above named automobile within the custody of the Court as of monition to all parties in interest to appear on the return day of such process, and duly intervene herein by claim and plea in the premises, and due process being had thereon, that for the causes aforesaid, the above named automobile be condemned by decree of forfeiture, and the proceeds [fol. 3] thereof be distributed according to the law, or such other disposition be had thereof as the Court shall direct.

F. A. Linney, Attorney for the United States for the Western District of North Carolina.

IN UNITED STATES DISTRICT COURT

ANSWER OF RICHBOURG MOTOR CO.—Filed Apr. 2, 1927

Richbourg Motor Company, a corporation organized and existing under and by virtue of the laws of the State of North Carolina, intervening in the above-entitled matter and answering the libel filed herein, says:

1

That on January 21st, 1927, Richbourg Motor Company sold one Ford Coupe, Motor No. 14444150, to Mrs. Mary Honeycutt, and at the time of said sale said Mary Honeycutt executed a conditional sale agreement securing the sum of Four Hundred and Seventeen Dollars ($417.00), as the balance of the purchasing price on said car, a copy of which said conditional sale agreement is hereto attached and marked "Exhibit A," and that said conditional sale agreement was duly recorded in the Office of the Register of Deeds for Buncombe County, on the 27th day of January,

1927, in Book of Chattel Mortgages No. 109, at Page 73, and that all of the indebtedness secured by said conditional sale agreement, together with interest on any notes which have matured, remains unpaid.

2

That the Richbourg Motor Company has sold the said Mrs. Mary Honeycutt a Ford Automobile previous to this time and taken a conditional sale agreement on said automobile, and that said Mrs. Mary Honeycutt had paid for said car in full, and that Richbourg Motor Company be- [fol. 4] lieved that she would pay for this automobile in full.

3

That the said Richbourg Motor Company, prior to making said sale to Mrs. Mary Honeycutt, made an investigation of her reputation and credit among people who were in a position to know her character and standing, and at the same time secured a statement from the said Mary Honeycutt, a copy of which is attached to the conditional sale agreement hereinbefore mentioned, and that acquaintances of said Mary Honeycutt informed the Richbourg Motor Company that she was a woman of good standing in the community and was reliable; that she gave her age as fifty-six years and her profession as a nurse, and Richbourg Motor Company believed, and had every reason to believe, that she was a woman of good standing and thoroughly reliable; that shortly after this car was seized, Richbourg Motor Company had a conference with Mrs. Mary Honeycutt, and she made an affidavit to the effect that she had let her relative, a young man, have her car to go to Asheville and that the next she heard of the car, it was captured near Hendersonville with whiskey in it and with the same young man in the car. She further stated that she was ignorant of any intention on the part of the young man to haul whiskey, and that if she had known of any such intentions on his part, or had reason to believe that he had any such intentions, she would not have let him have the car under any circumstances. This affidavit was sent by Richbourg Motor Company to Mr. Kenneth J. Kindley, Assistant United States District Attorney, at Charlotte.

4

Richbourg Motor Company further states that it takes extra caution in regard to selling cars to anyone, and will not sell a car to any person who does not furnish Richbourg Motor Company with good references, which Richbourg Motor Company investigates, and Richbourg Motor Company had never heard of Mrs. Mary Honeycutt having anything to do with whiskey, in any manner whatsoever.

[fol. 5] 5

Richbourg Motor Company further states that it is of the opinion that the car herein mentioned now is not worth the amount of the indebtedness secured by the said conditional sale agreement.

Wherefore Richbourg Motor Company prays that said automobile may be turned over to it for sale under its conditional sale agreement, and for such other relief as to the Court may seem proper.

R. R. Williams, Attorney for Richbourg Motor Company.

Duly sworn to by H. G. Reagan. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

MINUTES OF TRIAL

At the May-adjourned Term of the District Court of the United States for the Western District of North Carolina, begun and holden in the City of Asheville, in said District, on the 16th day of July, 1928; among others, the following proceedings were had:

[fol. 6] [Title omitted]

The case was called and both plaintiff and defendant announce their readiness for trial, whereupon the issues were joined and the following jurors were duly sworn and impanelled to-wit: R. W. Beachboard, S. E. Draper, P. N.

Price, C. G. Mears, A. N. Pool, F. C. McCracken, Tom Lanning, S. E. Johnson, Glen A. Boyd, J. M. Roberts, Joe Phipps and W. E. Anderson.

Two United States witnesses were duly sworn and examined.

Counsel for both plaintiff and defendant address the Court and jury.

The Court then charged the jury, and they responded to the issues as follows:

1. Was the Ford Coupe Motor Number 1-444150 engaged in removing and concealing untax paid liquor as alleged in the libel?

Answer. 'Yes.'

IN UNITED STATES DISTRICT COURT

AGREED STATEMENT OF EVIDENCE AND FACTS, MOTIONS OF COUNSEL, AND RULINGS OF THE COURT, WHICH OCCURRED AT THE TRIAL—Filed Oct. 2, 1928

Mr. W. W. OWENS, a National Prohibition Officer, testified as follows:

On or about the 22nd day of February, 1927, I seized Ford Coupe No. 14,444,150 from Ruth Bryson, H. C. Collins and Jesse Neal. It had twelve gallons and a pint of corn [fol. 7] whiskey in it, which was in half gallon fruit jars. The twelve gallons were in twenty-four containers, and in two cases in the back of the car, twelve containers being in each case. The pint was in Mrs. Bryson's lap in the front of the car. It was new liquor and was concealed in the back of the car. The car was in motion when I first saw it. I saw them come down the highway, and as they came back I got them. They were gone about an hour. I took charge of the car and made a report to my superior officer. There was nothing about the liquor to indicate that any tax had been paid on it. There were no government stamps on it. The lid on the back of the coupe was down and the door was locked. It was what is known as moonshine liquor, and smelled like whiskey we often capture in this section. I knew Mrs. Bryson, the girl in the car, and

was suspicious of the car. I saw it going down the road and watched for it as it came back. Then I saw it coming back up the road and stopped the car on the main highway and made an investigation and found this liquor in the car. At that time there were three persons in the car, and I arrested all three of those persons and took them before the Commissioner for committal to the Federal Court, and at the same time I seized the automobile and took charge of it. I knew Ruth Bryson, who was the only woman in the car. The whiskey was locked in the back of the car. A charge of transporting whiskey in violation of the Prohibition Act was brought against the occupants of the car before the Commissioner, and when the case came to the Federal Court the occupants were indicted under Section 3296.

It is agreed that the occupants of the car were arrested by Mr. Owens; that warrant was issued against them charging them with transportation and possessing whiskey in violation of the National Prohibition Act; that thereafter when the case was reported to the United States Attorney he caused a bill of indictment to be sent to the Grand Jury charging a violation under Section 3296 of the Revised Statutes; that is, removing and concealing.

It is agreed that the Richbourg Motor Company had made a careful investigation as to Mrs. Mary Hunnicutt on two occasions; that Mrs. Mary Hunnicutt had purchased a [fol. 8] Ford automobile from Richbourg Motor Company previously to the time she purchased the automobile in question; that at the time of the purchase of the first automobile, Richbourg Motor Company required her to give references as to persons who knew her and knew her general character; that Richbourg Motor Company interviewed those persons to whom Mrs. Mary Hunnicutt referred them and ascertained from those references that Mrs. Mary Hunnicutt was a reliable and law-abiding woman, and that there was no information or suspicion that she was engaged in the violation of any law or had ever engaged in the liquor business in any way; that at the time of the purchase of the automobile involved in this action, Richbourg Motor Company made another investi-

gation and required references from Mrs. Mary Hunnicutt as to persons who knew her and knew her general character, and ascertained from this second investigation that Mrs. Mary Hunnicutt was a law-abiding woman and was not suspected of violating any of the liquor laws in any way; that the Richbourg Motor Company refuses to sell automobiles to any person who has ever violated any of the liquor laws of the country or who is under any suspicion of violating any of the prohibition laws of the country.

It is admitted that Richbourg Motor Company sold this car to Mary Hunnicutt and has a conditional sales contract, and that there is no collusion and that it is a bona fide holder.

It is agreed that at the time of the seizure of said automobile there was on record in the office of the Register of Deeds of Buncombe County, State of North Carolina, in Book of Chattel Mortgages No. 109, Page 73, a conditional sales agreement, copy of which is attached to the answer of the intervenor filed in this case, and that the amount of the indebtedness of the said Richbourg Motor Company secured by said chattel mortgage on said Ford coupe amounted, at the time of the seizure, to $417.00, balance of the purchase price on said car, which mortgage was taken at the time of the purchase of said car in good faith by the Richbourg Motor Company.

At the close of all the evidence, the intervenor, Richbourg Motor Company, moved to dismiss the libel on the ground, among others, that the United States had elected to proceed [fol. 9] under the National Prohibition Act and was barred from proceeding under Section 3450, and on the ground that the prohibition officer discovered persons engaged in the act of transportation of intoxicating liquors and it was mandatory to proceed under the National Prohibition Act. Motion overruled and Richbourg Motor Company excepts.

The intervenor, Richbourg Motor Company tenders the following issue: Was the Ford coupe, Motor No. 14,444,150, actually engaged in transporting liquor and were persons in the car and arrested at the time of the seizure of said car?

The Court declines to submit the issue submitted by the intervenor, Richbourg Motor Company, because the issue

is not raised by the pleadings in the case for the determination of the law question involved.

Intervenor, Richbourg Motor Company, excepts.

The Court: There is one issue: "Was the car, Ford Coupe No. 14,444,150, engaged in removing and selling untax paid *lingor*, as alleged in the libed of plaintiff"? You have heard the testimony about it. If you find it was, you will answer the issue "Yes"; if you find it was not, you will answed the issue "No."

It is agreed that the foregoing is a true and correct statement of the evidence and facts, motions of counsel, and rulings of the Court at the trial of the above entitled matter.

Thos. J. Harkins, United States District Attorney and Attorney of Record for the United States of America, Appellee. Chas. G. Lee, Jr., R. R. Williams, Attorneys for Richbourg Motor Company, Appellant.

The foregoing Agreed Statement of Facts and Evidence, Motions of Counsel, and Rulings of the Court at the Trial are approved by me.

E. Y. Webb, United States District Judge

[fol. 10] IN UNITED STATES DISTRICT COURT

At Law. No. 718

UNITED STATES OF AMERICA, Libelant,

v.

ONE FORD COUPE, Motor No. 14,444,150, License No. 325,980

JUDGMENT—Filed Sept. 21, 1928

This cause coming on for hearing and being heard before Hon. E. Y. Webb, United States District Judge for the Western District of North Carolina and a jury;

And it appearing to the Court that, on the 22nd day of February, 1927, Federal Officers captured one Ford Coupe automobile, Motor No. 14,444,150, from Ruth Bryson, H. C.

Collins, and Jessie Neal, and twelve and one-eighth (12 1/8) gallons of untaxpaid liquor;

And it further appearing to the Court that, on the 3rd day of March, 1927, a libel was filed against the said Ford Coupe automobile, by the United States Attorney for the Western District of North Carolina, for violation of Section 3450 R. S., removing and concealing twelve and one-eighth gallons of untaxpaid liquor;

And it further appearing to the Court that the Richbourg Motor Company intervened and answered said libel by the United States of America and set out the fact that they, the Richbourg Motor Company, held a chattel mortgage, duly registered in the office of the Register of Deeds, for the County of Buncombe, State of North Carolina;

And it further appearing to the Court that on the 19th day of May 1927, the Richbourg Motor Company placed in the hands of the United States Clerk a good and sufficient bond for $350.00, signed by Richbourg Motor Company, by J. A. Richbourt, President, and E. L. Sams as surety on said bond, said bond being for the purpose of releasing said automobile;

And it further appearing to the Court that an order of [fol. 11] restitution was issued by the United States Clerk for the Western District of North Carolina and the said automobile was delivered to the intervenor, Richbourg Motor Company;

And it further appearing to the Court that the condition set out in the bond was that the said automobile should be delivered to the said Richbourg Motor Company, and if judgment passes against said Richbourg Motor Company, claimant, as to the whole or any part of said automobile the said claimant would pay into the Court the amount of the bond, the appraised value of the automobile, $350.00;

And it further appearing to the Court on the 17th day of July, 1928 this cause came on for hearing before Hon. E. Y. Webb, United States District Judge for the Western District of North Carolina, and a jury; and that after the evidence was submitted by both the plaintiff, the United States of America, and the intervenor, the Richbourg Motor Company, one issue was submitted to the jury, to-wit: was the Ford Coupe Motor No. 14,444,150 engaged in the remov-

ing and concealing of untaxpaid liquor as alleged in the libel; and this issue was answered "yes";

It is now therefore, ordered and adjudged that the bond for $350.00 signed by Richbourg Motor Company by J. A. Richbourg, President as principal, and E. L. Sams as surety, be forfeited in the full amount to the United States Government, with the costs to be taxed by the Clerk, and interest from the 19th day of May, 1927.

This the 17th day of July, 1928.

E. Y. Webb, United States Judge.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed Sept. 29, 1928

Now comes Richbourg Motor Company, intervenor and appellant in the above entitled cause, and files the following assignment of errors, upon which it will rely upon its prose-
[fol. 12] cution of the appeal in the above entitled cause from the decree made by this Honorable Court on the 19th day of July, A. D., 1908:

1

That the United States District Court, for the Western District of North Carolina, erred in overruling the motion of the intervenor and appellant to dismiss the libel for the following reasons and errors, which are assigned as errors on appeal:

(1) It appears from the uncontradicted evidence that three persons were discovered actually engaged in transporting intoxicating liquors, by a National Prohibition Officer, and that the persons so engaged in transportation were arrested and the car seized by said Prohibition Officer, making it mandatory to proceed under the National Prohibition Act.

(2) That the persons arrested for transporting intoxicating liquor in the car which was seized were charged before the United States Commissioner of violating the Prohibition Act, and this act on the part of the Government constituted an election to proceed under the National Prohibition Act, and the United States was barred from proceeding under Section 3450.

2

That the United States District Court, for the Western District of North Carolina, erred in declining to submit the following issue tendered by the intervenor and appellants:

"Was the Ford Coupe, Motor No. 14,444,150, actually engaged in transporting liquor and were persons in the car and arrested at the time of the seizure of said car?"

3

That the United States District Court, for the Western District of North Carolina, erred in submitting the following issue to the jury:

[fol. 13] "Was Ford Coupt No. 14,444,150 engaged in removing and selling untax-paid liquor as alleged in the libel of the plaintiff?"

4

That the United States District Court, for the Western District of North Carolina, erred in signing and entering the decree set forth in the record, for the following reasons:

(1) It appears from the uncontradicted evidence that three persons were discovered actually engaged in transporting intoxicating liquors, by a National Prohibition Officer, and that the persons so engaged in transportation were arrested and the car seized by said Prohibition Officer, making it mandatory to proceed under the National Prohibition Act.

(2) That the persons arrested for transporting intoxicating liquor in the car which was seized were charged before the United States Commissioner of violating the Prohibition Act, and this act on the part of the Government constituted an election to proceed under the National Prohibition Act, and the United States was barred from proceeding under Section 3450.

(3) That Richbourg Motor Company, intervenor, made a diligent investigation of Mrs. Mary Honeycutt, to whom the car was sold, and found her to be a woman of good character; and that there was no collusion between Richbourg Motor Company and Mary Honeycutt, and that the Richbourg Motor Company is a bona fide holder of a conditional

sales contract retaining title to the Ford Coupe involved in this suit, which agreement was duly recorded in the proper office prior to the seizure of said automobile.

Wherefore the appellant prays that said decree be reversed, and that the said libel be dismissed, and for such other and further orders as may be proper in the premises.

Chas. G. Lee, Jr., R. R. Williams, Counsel for Intervenor, Appellant.

[fol. 14] In United States District Court

Memorandum Provided by Section Seven of Rule 14

Petition for appeal dated Sept. 18, 1928.
Order allowing appeal filed Sept. 29, 1928.
Notice of appeal dated September 18, 1928.
Acceptance and waiver of service dated Sept. 22, 1928.
Appeal bond dated Sept. 18, 1928, penalty $600.00, obligors—Richbourg Motor Company, Principal, and J. A. Richbourg and U. G. Speed, Sureties.
Conditioned to pay damages and costs.
Citation dated September 20th, 1928.

In United States District Court

Stipulation re Transcript of Record, etc.—Filed Sept 29, 1928

It is hereby stipulated and agreed between counsel for Richbourg Motor Company, appellant, and United States of America, appellee, that the notice of appeal, assignment of errors and petition for appeal were all dated on the 18th day of September, A. D., 1928; that service of the notice of appeal was accepted by the appellee on the said 18th day of September, 1928, and that the said petition was granted and appeal allowed and citation issued on the 20th day of September, 1928, and that service of said citation was accepted on the 22nd day of September, A. D., 1928, and that the said notice of appeal, assignment of errors, petition for

appeal, and citation, and all other papers, were filed in the office of the Clerk of the District Court of the United States, for the Western District of North Carolina, on the 28th day of September, A. D., 1928, and that on said date the appellant filed a justified bond, in the sum of Six Hundred Dol-
[fol. 15] lars ($600.00), to act as a supersedeas bond and also as a bond for costs and damages on appeal, in the form and for the amount fixed by the Judge and approved according to law.

It is further stipulated and agreed that the record in this case shall consist of the following:

(1) Libel.

(2) Answer of Richbourg Motor Company as Intervenor.

(3) Minute entries empanelling jury.

(4) Agreed statement of evidence and facts, motions of counsel, and rulings of the Court which occurred at the trial.

(5) Verdict.

(6) Judgment.

(7) Assignment of errors.

(8) Memorandum, notice of appeal, petition, writ of error, bond, and citation.

(9) This stipulation.

(10) Clerk's order to transmit record.

(11) Clerk's certificate.

It is further stipulated and agreed between the parties hereto that the Clerk of this Court shall make up transcript of the record in the above styled case and transmit the same to the United States Circuit Court of Appeals, for
[fol. 16] the Fourth Circuit, at Richmond, Virginia, and that it shall be printed under the supervision of the Clerk of that Court, in accordance with Rule 23.

Thos. J. Harkins, United States District Attorney and Attorney of Record for the United States of America, Appellee. Chas. G. Lee, Jr., R. R. Williams, Attorneys for Richbourg Motor Company, Appellant.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 17] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 2808

RICHBOURG MOTOR COMPANY, Intervenor, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Western District of North Carolina, at Asheville.

MINUTE ENTRIES

October 12, 1928, the transcript of record is filed and the cause docketed.

Same day, the original notice of appeal, petition for appeal, order allowing appeal, bond, and citation are certified up under Sec. 7 of Rule 14.

Same day, the appearance of R. R. Williams and Charles G. Lee, Jr., is entered for the appellant.

October 15, 1928, the appearance of Thos. J. Harkins, U. S. Attorney, is entered for the appellee.

November 2, 1928, twenty-five copies of the printed record are filed.

January 12, 1929, stipulation of counsel to continue cause to the June term, 1929, is filed.

Same day, to-wit, January 12, 1929, cause continued in Open Court to June term, 1929, per stipulation of counsel.

[fol. 18] ARGUMENT OF CAUSE

July 5, 1929 (June term, 1929), cause came on to be heard before Parker and Northcott, Circuit Judges, and Soper, District Judge, and is submitted on the briefs.

In United States Circuit Court of Appeals, Fourth Circuit

No. 2808

Richbourg Motor Company, Intervenor, Appellant

versus

United States of America, Appellee

Appeal from the District Court of the United States for the Western District of North Carolina, at Asheville

(Submitted on Briefs July 5, 1929. Decided July 22, 1929)

Before Parker and Northcott, Circuit Judges, and Soper, District Judge

Opinion—Filed July 22, 1929

[fol. 19] Per Curiam:

This is a proceeding for the forfeiture of an automobile under Section 3450 of the Revised Statutes. On February 22, 1927, the automobile in question was being operated by a Mrs. Bryson who, with two companions, was driving therein. A prohibition enforcement officer stopped them and, upon searching the car, found more than twelve gallons of whiskey. He thereupon took the car into his possession and arrested the occupants, who were bound over to court by a United States Commissioner on a charge of violating the National Prohibition Act. The United States Attorney, however, did not proceed under the National Prohibition Act, but sent a bill of indictment against the occupants of the car under Section 3296 of the Revised Statutes and filed a libel against the car itself under Section 3450. An intervening petition claiming the car was filed by the Richbourg Motor Company, the innocent holder of an unsatisfied purchase money lien thereon, but the District Judge ordered it forfeited and the motor company has appealed.

We think that the decree of forfeiture was clearly correct. U. S. v. One Ford Coupe, 272 U. S. 321, 331; U. S. v. Commercial Credit Company (C. C. A. 4th), 20 Fed. (2d) 519; General Motors Acceptance Corporation v. U. S. (C. C. A. 4th), 23 Fed. (2d) 799. The case at bar differs from the cases of Port Gardner Investment Co. v. U. S., 272 U. S.

564, and Commercial Credit Co. v. U. S., 276 U. S. 226, in that in those cases the persons in the automobiles which were proceeded against were prosecuted and convicted under the National Prohibition Act; and it was held that this precluded the government from resorting to proceedings under Section 3450 against the automobiles. Here the United States Attorney has elected to proceed against the occupants of the car as well as against the car itself under the revenue statutes. The case differs from that of Commercial Credit Corporation v. U. S., 18 Fed. (2d) 927, a decision of the Circuit Court of Appeals of the Second Circuit, in that there the United States Attorney had elected to proceed against the occupants of the car under the National Prohibition Act by filing an information against them charging violation of that act. Without passing upon the question involved in that case, we are satisfied that in [fol. 20] a case such as this, where there has been no election to prosecute the guilty parties under the National Prohibition Act, the government may proceed under Section 3450 of the Revised Statutes, and that against such proceeding the rights of an innocent lien claimant will not avail. We have discusssed this matter at length in U. S. v. Commercial Credit Co., supera, 20 Fed. (2d) 519, and we need not repeat what we said there. The decree of the District Court will accordingly be affirmed.

Affirmed.

In United States Circuit Court of Appeals, Fourth Circuit

No. 2808

Richbourg Motor Company, Intervenor, Appellant,

vs.

United States of America, Appellee

Appeal from the District Court of the United States for the Western District of North Carolina

Judgment—Filed and Entered July 22, 1929

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of North Carolina, and was argued by counsel.

[fol. 21] On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

July 22, 1929.

John J. Parker, U. S. Circuit Judge

IN UNITED STATES CIRCUIT COURT OF APPEAL

MINUTE ENTRIES RE MANDATE AND APPEAL

On another day, to-wit, August 22, 1929, the mandate of this Court in this cause is issued and transmitted to the United States District Court at Asheville, North Carolina, in due form.

Same day, the original notice of appeal, petition for appeal, order allowing appeal, and bond are returned to the Clerk of the District Court, at Asheville, North Carolina.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 22] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 2, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,583. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 452. Richbourg Motor Company, intervenor, petitioner, vs. The United States of America. Petitioner for writ of certiorari and exhibit thereto. Filed October 21, 1929. Filed No. 34,583.

FILE COPY

OCT
CHARLES E

IN THE

Supreme Court of the United States.

OCTOBER TERM—1929.

No. 452

RICHBOURG MOTOR COMPANY,
Petitioner

—against—

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

JOSEPH G. MYERSON,
Counsel for the Petitioner.

CHARLES G. LEE, JR.,
R. R. WILLIAMS,
Of Counsel.

THE COURT PRESS—Law Printers—17 West Street—Bowling Green 2820-1-4

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STATUTES:

National Prohibition Act, Title II, Section 26; 27 U. S. C. A., Section 40 2

R. S. 3450, 26 U. S. C. A., 1181 4

IN THE

Supreme Court of the United States,

OCTOBER TERM—1929.

No. .

RICHBOURG MOTOR COMPANY,

Petitioner

—against—

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

PETITION

Your petitioner, Richbourg Motor Company, by Joseph G. Myerson, its counsel, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered in the above entitled case on July 22, 1928, affirming the decision of the United States District Court for the Western District of North Carolina (at Asheville).

QUESTION PRESENTED

May proceedings in forfeiture under R. S. 3450 (26 U. S. C. A., 1181) be maintained against an automobile

seized by a Prohibition Officer while being used to transport intoxicating liquor under circumstances which indicate a violation of Section 26 of the National Prohibition Act?

Both the District Court for the Western District of North Carolina and the Circuit Court of Appeals for the Fourth Circuit answered this question in the affirmative. That answer the petitioner contends is erroneous.

Statutes Involved

National Prohibition Act, Title II, Sec. 26, Chap. 85, Act. Oct. 28, 1919; 41 St. L. 305, 315; 27 U. S. C. A., Sec. 40.

> Sec. 26. When the commissioner, his assistant, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on

the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the same, shall pay all liens, according to their priorities, which are established, by intervention or otherwise, at said hearing or in any other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks, and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

R. S., Sec. 3450, 26 U. S. C. A., Sec. 1181:

SEC. 3450. REMOVING AND CONCEALING ARTICLES WITH INTENT TO DEFRAUD UNITED STATES OF TAX—FORFEITURE AND PENALTY. Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited. And every person who removes, deposits, or conceals, or is concerned in removing, depositing or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than five hundred dollars. And all boilers, stills, or other vessels, tools and implements, used in distilling or rectifying, and forfeited under any of the provisions of this Title, and all condemned material together with any engine or other machinery connected therewith, and all empty barrels, and all grain or other material suitable for distillation, shall, under the direction of the court in which the forfeiture is recovered, be sold at public

auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of according to law. And all spirits or spiritous liquors which may be forfeited under the provisions of this Title, unless herein otherwise provided, shall be disposed of by the Commissioner of Internal Revenue as the Secretary of the Treasury may direct.

Statement

The facts are succinctly stated in the *per curiam* opinion of the Circuit Court (R. 18) as follows:

> "On February 22nd, 1927, the automobile in question was being operated by a Mrs. Bryson, who with two companions, was driving therein. A prohibition enforcement officer stopped them and, upon searching the car, found more than twelve gallons of whiskey. He thereupon took the car into his possession and arrested the occupants, who were bound over to court by a United States Commissioner on a charge of violating the National Prohibition Act. The United States attorney, however, did not proceed under the National Prohibition Act, but sent a bill of indictment against the occupants of the car under Section 3296 of the Revised Statutes and filed a libel against the car itself under Section 3450. An intervening petition claiming the car was filed by the Richbourg Motor Company, the innocent holder of an unsatisfied purchase money lien thereon, but the District Judge ordered it forfeited and the motor company has appealed."

From the record (R. 7) it appears that on or about February 22, 1927, W. W. Owens, a Federal Prohibition

Officer, seized Ford coupe No. 14444150, from Ruth Bryson, H. C. Collins and Jessie Neal under the following circumstances: *The officer saw the automobile proceeding on the road and was suspicious of the car because he knew Mrs. Bryson, one of the occupants. He watched for the car and as it came back stopped it on the main highway.* Finding liquor in the car upon investigation, he seized the automobile and arrested the three persons in the machine, taking them before the United States Commissioner, where they were charged with transporting whiskey in violation of the Prohibition Act (R. 7).

The United States Attorney thereafter obtained a bill of indictment against the occupants of the car under Section 3296 of the Revised Statutes and filed a libel against the automobile under Section 3450 (R. 7). An intervening petition was filed by Richbourg Motor Company, which had sold the machine to Mary Hunnicutt, under a conditional sales contract, after an investigation which disclosed to Richbourg Motor Company that Mrs. Hunnicutt was a reliable and law abiding woman, and that there was no information or suspicion that she was engaged in the violation of any law or had ever engaged in the traffic of intoxicating liquor (R. 7-8). The unpaid balance under the conditional sales contract at the time of the seizure was $417.00 (R. 8).

Specification of Errors to be Urged

The Circuit Court of Appeals erred in holding that the automobile which was being used to transport intoxicating liquor in violation of the National Prohibition Act could be forfeited pursuant to Section 3450 of the Revised Statutes.

Reasons for Granting the Writ

1. The question involved is one of great public importance and vitally affects the Government in its administration of the National Prohibition Act. United States Attorneys in the various districts are not agreed upon an interpretation of the law and consequently the procedure in the various districts is neither uniform nor consistent.

2. The issue is important to industry since annually automobiles of the estimated value of two million dollars are confiscated for illicit traffic in intoxicating liquors. Because of the present confusion in the construction of the law, automobile companies and finance companies are uncertain as to their rights. This condition induces excessive litigation, delay and expense to the companies interested as well as to the United States Government.

3. A final determination by this Court will clarify the law since the various Circuit Courts and District Courts have reached diverse conclusions on this issue. The Circuit Court decision in this case is at variance with the holding of the Circuit Court of Appeals for the Fifth Circuit in the case of *United States* v. *General Motors Acceptance Corporation*, 25 F. (2nd) 238.

4. The case presents clearly for the consideration of this Court an issue which was left undecided by the important cases of *United States* v. *One Ford Coupe Automobile*, 272 U. S. 321; *Port Gardner Investment Co.* v *United States*, 272 U. S. 564; and *Commercial Credit Co.* v. *United States*, 276 U. S. 226.

5. Many cases in which this question is at issue are pending in the Federal Courts.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fourth Circuit should be granted.

RICHBOURG MOTOR COMPANY,
By JOSEPH G. MYERSON,
Counsel for the Petitioner.

CHARLES G. LEE, JR.,
R. R. WILLIAMS,
Of Counsel.

October, 1929.

BRIEF IN SUPPORT OF PETITION

Opinions Below

No opinion was filed by the United States District Court for the Western District of North Carolina. The opinion of the Circuit Court of Appeals for the Fourth Circuit affirming the judgment of the District Court (R. 18) is reported in 34 F. (2nd) 38.

Jurisdiction

The judgment of the Circuit Court of Appeals for the Fourth Circuit was entered on July 22, 1928 (R. 20). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statement

A statement of the facts and of the errors relied on will be found in the petition.

Argument

I

FORFEITURE PROCEEDINGS OF AUTOMOBILES USED IN THE TRANSPORTATION OF INTOXICATING LIQUORS MUST BE INSTITUTED UNDER SECTION 26 OF THE NATIONAL PROHIBITION ACT AND MAY NOT BE MAINTAINED UNDER SECTION 3450 OF THE REVISED STATUTES.

Section 26 is mandatory in its requirement that when a vehicle is found under circumstances indicating unlaw-

ful transportation, proceedings in forfeiture must be brought under that section. As to unlawful transportation therefore, Section 26 is clearly inconsistent with and to that extent has repealed Section 3450. This view has been expressed directly or by concurrence by four of the Justices of this Court.

It is true that this Court has held that Section 26 of the National Prohibition Act did not entirely repeal Section 3450 of the Revised Statutes and that the latter section may in a proper case be invoked (*United States* v. *One Ford Coupe Automobile*, 272 U. S. 321). In that case, however, the question of whether Section 26 repealed Section 3450 as to unlawful transportation as distinguished from unlawful possession not incident to transportation, was not considered.

That question has been touched upon but not decided in three cases heretofore before this Court and the argument herein contained shall proceed solely upon the language of this Court in the three cases. These are in the order of their consideration by this Court: *United States* v. *One Ford Coupe Automobile*, 272 U. S. 321; *Port Gardner Investment Co.* v. *United States*, 272 U. S. 564; *Commercial Credit Co.* v. *United States*, 276 U. S. 226.

In the *Ford Coupe* case the Court, referring to the issue here involved, stated at page 333:

> "The claimant contends that, as applied to intoxicating liquors, §3540 and §26 are alternative remedies; and may not be employed cumulatively. Section 26 commands that when a person is discovered in the act of transporting, by means of a vehicle, intoxicating liquors in violation of the law, the officer shall take possession of the vehicle

and shall arrest the person in charge thereof; that the person shall be proceeded against for the violation; that, pending the proceeding against him, the vehicle shall be surrendered to the owner upon giving bond to return it to the custody of the officer on the day of the trial to abide the judgment of the court; that, in case of conviction of the person, the vehicle shall be sold under conditions and in a manner prescribed; that the proceeds remaining after paying the expenses shall be paid over to lienors innocent of wrong doing; and that, unless and except so far as there are such lienors or others entitled thereto, the net proceeds shall be paid into the Treasury of the United States. The claimant insists not only that the government must elect between §26 and §3450, but that the commencement of proceedings under §26 bars a resort to §3450.

The case at the bar does not present any conceivable question of cumulative remedies or of election. While the second sentence in §26 uses the words 'transported or possessed', the context makes it very plain that the possession intended is possession in transportation. Hence that section is applicable only if a person is discovered in the act of transporting intoxicating liquor in violation of law. There is no allegation in the libel that the automobile had been so discovered or was being so used."

Accordingly, the Court did not pass upon the issue. However, Mr. Justice Stone in his concurring opinion in the *Ford Coupe* case, observed:

"I agree also that there conceivably may be a deposit or concealment of illicit liquor in an auto-

> mobile with intent to defraud the United States of the tax upon it, which is not transportation within the meaning of §26 and to that extent the two sections are not in conflict. *But I cannot subscribe to those expressions in the opinion which seem to suggest that the two sections are not in direct conflict, in a case where there is transportation of liquor in a vehicle in violation of the National Prohibition Law with intent to defraud the United States of the tax. In that case, §26, it seems to me, plainly directs that the seizure shall be made and proceedings for forfeiture of the seized vehicle had under that section."* (Italics ours.)

In the dissenting opinion in the *Ford Coupe* case Mr. Justice Butler did not follow the majority of the Court in failing to consider the issue which was incidentally presented in the *Ford Coupe* case, and which is here squarely presented, stating at page 344:

> "The opinion proceeds on the theory that transportation of whiskey in the automobile is not shown outside the claim of the Garth Motor Company. And it is held that, the dismissal being set aside, hearing on the question whether Killian was transporting the whiskey may be had in the lower court. It seems to me the litigation need not be so delayed, and that the important question pressing for decision should be decided now",

and considering this important question, deemed in 1926 to be pressing and remaining in 1929 still undecided, Mr. Justice Butler goes on to state:

> "When the information was filed, the court issued a writ of attachment, commanding the mar-

shal to attach the automobile 'which is now being held by Edgar N. Read, acting prohibition director', to detain it until the further order of the court and to give notice to the claimant. The marshal made his return that he had executed the writ by handing a copy to Acting Director Read and by seizing the automobile. December 6, 1923, the claimant filed a motion to quash the libel. April 14, 1924, it filed its claim, alleging that the title to the automobile which was seized while being used by Killian 'in and about the unlawful transportation of intoxicating liquors' was in the company, subject to a conditional sales contract, and gave the bond provided for in §26, which was approved by the District Judge. The motion to quash was sustained and the libel was dismissed. The District Judge filed no opinion. The Circuit Court of Appeals affirmed the judgment. 4 F. (2nd) 528. In its opinion that court said: 'The position now taken by the government in this case is that the interest of an innocent owner or lien holder may be forfeited if the automobile is standing still, but that such interest is protected if the automobile is in motion. That view could easily result in manifest injustice; for under it, as an illustration, the interest of an innocent holder of a lien on an automobile could be forfeited upon proof that while it was parked on a public street liquor was concealed in it by someone who had the intent to defraud the government of its internal revenue tax'. And the court held that §3450 is superseded by §26 in so far as there is conflict between them. It dealt with the case as one involving a violation of §26.

I think the court's interpretation of the record was right. The prohibition agent discovered Kil-

lian in possession of an automobile containing 27 quarts of illicit whiskey in violation of the National Prohibition Act. The agent seized the vehicle; and, as it was his duty to do so, it must be found that he also seized the whiskey. The prosecution of Killian was commenced by filing complaint charging him with the crime of *illegal possession* in violation of that act. The facts stated make out 'transportation'. * * * I am of the opinion that the decree should be affirmed. * * *

Section 26 directs the proceedings to be taken in respect of the vehicle 'whenever intoxicating liquors transported or possessed illegally shall be seized by an officer'. The libel brings the case within the words and meaning of the clause just quoted."

The dissenting opinion of Mr. Justice Butler received the concurrence of Mr. Justice McReynolds and Mr. Justice Sutherland.

In the *Port Gardner Company* case six questions were presented by the Certificate. The fifth question was: "Did the prosecution of the driver of the car under the National Prohibition Act constitute an election by the Government to proceed under Section 26 of the Act and thereby prevent the forfeiture of the car under Section 3450 of the Revised Statutes of the United States?"

The opinion of the Court delivered by Mr. Justice Brandeis considering the fifth question stated at page 566:

"The disposition of the automobile prescribed in §26 became mandatory after Neadeau's conviction; and being inconsistent with the disposi-

tion under §3450 necessarily precluded resort to proceedings under the latter section. Construing the fifth question as referring to the prosecution with effect, we answer the question in the affirmative.

We need not determine whether the mere commencement of a proceeding under §26 constitutes an election. Nor need we give specific answers to the other questions asked, since the certificate does not disclose any reason why the sale of the automobile, subject to the interests of innocent parties, should not have been ordered by the District Court after the conviction of Neadeau."

So that as in the *Ford Coupe* case, the question we are interested in remained undecided.

In a concurring opinion, however, Mr. Justice Butler again, as in the *Ford Coupe* case, regretted the fact that the decision of the Court was qualified and restricted. The concurring opinion is short and follows in full:

"I agree that the answer to question 5 should be in the affirmative.

In the opinion it is said, 'Construing the fifth question as referring to the prosecution with effect, we answer the question in the affirmative.' This means prosecution and conviction of the driver constitute an election to proceed against the vehicle under §26 and prevent forfeiture under §3450. The answer is enough to guide the Circuit Court of Appeals in this case. But it leaves open the question which is not decided in No. 115. *The substance of that question is whether the prohibition officer discovering one in the act of transportation may disregard the plain and direct commands of §26 to proceed against the vehicle*

as there directed. I think he has no more right to ignore the command than he has to let the liquor and offender go. The law makes the election. (Italics ours.) I regret that this Court's answer is so qualified and restricted. Section 26 is not so restrained.

I am authorized to say that Mr. Justice Stone concurs in this opinion."

The final case considered by this Court, in which the issue here involved was raised but not decided, was that of *Commercial Credit Company* v. *United States*, 276 U. S. 226. In that case proceedings to forfeit an automobile under Section 3450 were brought after one Campbell, in charge of the automobile, having been prosecuted in the District Court under the National Prohibition Act on charges of unlawful possession and transportation of liquor, had pleaded guilty to unlawful possession, whereupon the Government had dismissed the charge of unlawful transportation.

The Circuit Court of Appeals, on the theory that Campbell's conviction of unlawfully possessing liquor was under Section 3 of Title II of the Prohibition Act, and therefore did not entail a disposition of the car under Section 26 of that title, held that the Government was at liberty to proceed under Section 3450 for the forfeiture of the automobile.

This Court reversed the decision of the Circuit Court of Appeals because the facts indicated that the possession, as to which he had pleaded guilty, was possession in transportation and that therefore under the doctrine of the *Port Gardner Investment Company* case the disposition of the car under Section 26 became mandatory after the conviction.

However, the Court in this *Commercial Credit* case, as in the *Port Gardner* case and in the *Ford Coupe* case, did not avail itself of the opportunity to answer the question propounded by Mr. Justice Butler in his concurring opinion in the *Port Gardner* case, declaring at page 231:

> "The claimant states that the question here presented is that which was referred to in a concurring opinion in the *Port Gardner Investment Company* case, namely, 'whether the prohibition officer discovering one in the act of transportation may disregard the plain and direct commands of §26 to proceed against the vehicle as there directed', and on that assumption the arguments have been largely directed to the question whether, whenever an officer discovers a person in the act of transporting intoxicating liquor in a vehicle, the provisions of §26 become mandatory in such sense as to furnish the exclusive remedy for the forfeiture of the vehicle. But, since it appears that the officer in fact seized the vehicle and arrested Campbell, who was in fact proceeded against under the Prohibition Act, the question of the officer's duty to proceed under §26 is not here involved."

II

PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED SO THAT THE ISSUE PRESENTED MAY BE FINALLY DETERMINED.

The petition herein points out that the Circuit Court decision in this case is at variance with the holding of the Circuit Court of Appeals for the Fifth Circuit in the

case of *United States* v. *General Motors Acceptance Corporation*, 25 F. (2nd) 238.

Not only is it true that the Circuit Courts of Appeals decisions referred to are at variance, but District Courts throughout the country continue, in circuits where the Circuit Court of Appeals has not had the question presented, to reach different conclusions. This has led to an unfortunate situation in that an innocent lienor whose automobile is seized in one part of the country may and does have greater rights than one whose automobile is seized in another part of the country. The United States Attorneys because of this confusion, in some parts of the country employ R. S. 3450 in practically all of their seizure cases, whereas in other parts of the country United States Attorneys seldom have recourse to that statute, but employ the National Prohibition Act, under which the lienor's interest is considered by the Court.

This is an unsound condition and cannot be corrected until the issue here presented is directly passed upon by this Court.

CONCLUSION

It is respectfully submitted that the issue in this case will flatly present to the Court that same question as to which Mr. Justice Butler, Mr. Justice Stone, Mr. Justice McReynolds and Mr. Justice Sutherland have expressed themselves as being in accord with the position taken by the petitioner, and as to which the majority of the Court has not found occasion directly to pass upon the point.

It is respectfully urged that the Court grant the relief prayed for by the petition in this case to the end that the law on the question at issue may be settled for the guid-

ance of Federal District and Circuit Courts, the Federal Prohibition Administrative agencies and of the automobile industry, relief under present conditions being largely a matter of geographical caprice.

JOSEPH G. MYERSON,
Counsel for the Petitioner.

CHARLES G. LEE, JR.,
R. R. WILLIAMS,
Of Counsel.

October, 1929.

FILE COPY

APR 2

CHARLES E.

IN THE

Supreme Court of the United States.

OCTOBER TERM—1929.

No. 452.

RICHBOURG MOTOR COMPANY,

Petitioner,

—against—

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PETITIONER.

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OPINIONS BELOW

No opinion was filed by the United States District Court for the Western District of North Carolina. The opinion of the Circuit Court of Appeals for the Fourth Circuit affirming the judgment of the District Court is reported in 34 F. (2nd) 38, and may be found in the record (p. 15).

QUESTION PRESENTED

May proceedings be maintained for the forfeiture under R. S. 3450 (26 U. S. C. A., 1181) of an automobile seized by a Prohibition Officer while being used to transport intoxicating liquor under circumstances which indicate a violation of Section 26 of the National Prohibition Act?

Both the District Court for the Western District of North Carolina and the Circuit Court of Appeals for the Fourth Circuit answered this question in the affirmative. Petition for certiorari was filed October 21, 1929, and certiorari was granted by this Court December 2, 1929.

Statutes Involved

National Prohibition Act, Title II, Sec. 26, Chap. 85, Act. Oct. 28, 1919; 41 St. L. 305, 315; 27 U. S. C. A., Sec. 40.

> Sec. 26. When the commissioner, his assistant, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed,

and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the same, shall pay all liens, according to their priorities, which are established, by intervention or otherwise, at said hearing or in any other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks, and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

R. S., Sec. 3450, 26 U. S. C. A., Sec. 1181:

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FORFEITURE AND PENALTY. Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited. And every person who removes, deposits, or conceals, or is concerned in removing, depositing or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than five hundred dollars. And all boilers, stills, or other vessels, tools and implements, used in distilling or rectifying, and forfeited under any of the provisions of this Title, and all condemned material together with any engine or other machinery connected therewith, and all empty barrels, and all grain or other material suitable for distillation, shall, under the direction of the court in which the forfeiture is recovered, be sold at public auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of according to law. And all spirits or spiritous liquors which may be forfeited under the provisions of this

Title, unless herein otherwise provided, shall be disposed of by the Commissioner of Internal Revenue as the Secretary of the Treasury may direct.

STATEMENT

The facts are succinctly stated in the *per curiam* opinion of the Circuit Court (R. 15) as follows:

> "On February 22nd, 1927, the automobile in question was being operated by a Mrs. Bryson, who with two companions, *was driving therein.* A prohibition enforcement officer *stopped them* and, upon searching the car, found more than twelve gallons of whiskey. He thereupon took the car into his possession and arrested the occupants, who were bound over to court by a United States Commissioner on a charge of violating the National Prohibition Act. The United States attorney, however, did not proceed under the National Prohibition Act, but sent a bill of indictment against the occupants of the car under Section 3296 of the Revised Statutes and filed a libel against the car itself under Section 3450. An intervening petition claiming the car was filed by the Richbourg Motor Company, the innocent holder of an unsatisfied purchase money lien thereon, but the District Judge ordered it forfeited and the motor company has appealed." (Italics ours.)

From the record (R. 5) it appears that on or about February 22, 1927, W. W. Owens, a Federal Prohibition Officer, seized Ford coupe No. 14444150, from Ruth Bryson, H. C. Collins and Jessie Neal under the following circumstances: *The officer saw the automobile proceeding on the road and was suspicious of the car because he knew Mrs. Bryson, one of the occupants. He watched*

for the car and as it came back stopped it on the main highway. Finding liquor in the car upon investigation, he seized the automobile and arrested the three persons in the machine, taking them before the United States Commissioner, where they were charged with transporting whiskey in violation of the Prohibition Act (R. 6).

The United States Attorney thereafter obtained a bill of indictment against the occupants of the car under Section 3296 of the Revised Statutes and filed a libel against the automobile under Section 3450. An intervening petition was filed by Richbourg Motor Company, which had sold the machine to Mary Hunnicutt, under a conditional sales contract, after an investigation which disclosed to Richbourg Motor Company that Mrs. Hunnicutt was a reliable and law abiding woman, and that there was no information or suspicion that she was engaged in the violation of any law or had ever engaged in the traffic of intoxicating liquor (R. 6-7). The unpaid balance under the conditional sales contract at the time of the seizure was $417.00 (R. 7).

Argument

Proceedings in forfeiture of automobiles used in the transportation of intoxicating liquors must be instituted under Section 26 of the National Prohibition Act and may not be maintained under Section 3450 of the Revised Statutes.

A

Section 26 is in direct conflict with, and as to a case involving a violation of both, has repealed Section 3450.

Let us assume a case where a person is apprehended

in such circumstances that violation of both Section 26 and Section 3450 is indicated. Indeed, such is the case at bar, for while the facts indicated deposit and concealment, that is violation of Section 3450, and the car was proceeded against under that section, they also indicated transportation, that is violation of Section 26.

The United States contends that under such conditions it may elect to invoke either section for the forfeiture of the automobile. We must concede the right to use Section 3450 unless it has become inoperative by virtue of an implied repeal or unless the right to elect may not in such a case be exercised.

That Section 3450 continues in effect generally may not be denied. This Court has so held in the case of *United States* v. *One Ford Coupe Automobile* (272 U. S. 321). Does it, however, continue to be applicable where a violation of Section 26 of the National Prohibition Act as well as of the Internal Revenue Section is indicated?

Section 5 of the Willis Campbell Act (27 U. S. C. A. 3) provides that all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor and all penalties for violation of such laws that were in force on October 28, 1929, shall be and continue in force as to both beverage and non-beverage liquor, *except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act.*

We are therefore put to the inquiry whether Section 3450 or any provision thereof is in conflict with Section 26 of the Prohibition Act in a case involving violation of both.

In circumstances which indicate a violation of Section 3450, but not of Section 26, there is no such general conflict as to result in the repeal of Section 3450. Such

was the situation in the *Ford Coupe* case and Mr. Justice Brandeis in that case recites at length the reasons for holding that there was no general repeal of Section 3450.

The opinion in that case even went so far as to indicate that there was no apparent conflict where a violation of both statutes was involved. However, it must be remembered that the Court was considering a case involving a violation only of Section 3450 (see p. 10 of this brief). It would seem, therefore, that the pronouncement of the Court on that particular point must be considered *dictum* and subject to further consideration by the Court in the light of the argument here presented as to the mandatory requirements of Section 26, which do not appear to have received discussion by the Court in the majority opinion in the *Ford Coupe* case.

That under such conditions, that is to say, where a violation of both statutes is indicated, there is a direct conflict between the statutes becomes evident upon analysis of the provisions of Section 26.

The provisions of Section 26 require:

(a) that upon an officer discovering that intoxicating liquor is being illegally transported or illegally possessed it shall be his duty to

1. Take possession of the automobile.
2. Arrest the person in charge thereof.
3. Proceed against the person arrested under the provisions of the National Prohibition Act.

(b) that the Court, upon conviction of the person, shall

1. Order the liquor destroyed.
2. Order the public sale of the automobile, unless good cause to the contrary is shown by the owner thereof.

(c) that the officer carrying out the order of sale of the Court shall

1. After deducting certain expenses provided for in the statute, pay all liens according to their priority, which are established by intervention or otherwise as being *bona fide* and existing in favor of one who had no notice of the proposed illegal use of the vehicle.

In short, the section is mandatory in its statement as to the duties and the obligations of the arresting officer and the Court, *whenever* there shall be discovered a violation of Section 26. The arresting officer, where violation of this section and a prior statute are both indicated, may not elect which remedy he will pursue, the United States Attorney may not so elect and the Court may not. Indeed, there may be no executive or judicial election, for as Mr. Justice Butler has pointed out in his dissenting opinion in the *Ford Coupe* case, the law, that is, Section 26, makes the election.

If Section 26 is mandatory, if it permits no recourse to Section 3450, does it not follow that in a case indicating a violation both of Section 26 and of Section 3450 the two provisions are in direct conflict and that as to such a case Section 3450 has not been saved by the Willis Campbell Act.

B

THE OPINIONS OF FOUR OF THE JUSTICES OF THIS COURT SUPPORT PETITIONER'S VIEW.

The point at issue in this case has been referred to but not decided in three cases heretofore before this

Court. These are in the order of their consideration by this Court: *United States* v. *One Ford Coupe Automobile,* 272 U. S. 321; *Port Gardner Investment Co.* v. *United States,* 272 U. S. 564; *Commercial Credit Co.* v. *United States,* 276 U. S. 226.

In the *Ford Coupe* case the Court, referring to the issue here involved, stated at page 333:

> "The claimant contends that, as applied to intoxicating liquors, §3540 and §26 are alternative remedies; and may not be employed cumulatively. Section 26 commands that when a person is discovered in the act of transporting, by means of a vehicle, intoxicating liquors in violation of the law, the officer shall take possession of the vehicle and shall arrest the person in charge thereof; that the person shall be proceeded against for the violation; that, pending the proceeding against him, the vehicle shall be surrendered to the owner upon giving bond to return it to the custody of the officer on the day of the trial to abide the judgment of the court; that, in case of conviction of the person, the vehicle shall be sold under conditions and in a manner prescribed; that the proceeds remaining after paying the expenses shall be paid over to lienors innocent of wrong doing; and that, unless and except so far as there are such lienors or others entitled thereto, the net proceeds shall be paid into the Treasury of the United States. The claimant insists not only that the government must elect between §26 and §3450, but that the commencement of proceedings under §26 bars a resort to §3450.
>
> *The case at bar does not present any conceivable question of cumulative remedies or of election.* While the second sentence in §26 uses

the words 'transported or possessed', the context makes it very plain that the possession intended is possession in transportation. *Hence that section is applicable only if a person is discovered in the act of transporting intoxicating liquor in violation of law. There is no allegation in the libel that the automobile had been so discovered or was being so used.*" (Italics ours.)

Accordingly, the Court did not pass upon the issue. Indeed the Court stated that the sole question for decision in the *Ford Coupe* case was whether an automobile which was seized by a prohibition agent may be forfeited under Section 3450 if it was being used for the purpose of depositing or concealing tax unpaid illicit liquors with the intent to defraud the United States of the taxes imposed thereon.

However, Mr. Justice Stone in his concurring opinion in the *Ford Coupe* case, observed:

> "I agree that the Willis-Campbell Act requires Section 3450 of the Revised Statutes and Section 26 of the National Prohibition Law to be so construed as to stand together *in so far as they are not in direct conflict.*
>
> I agree also that there conceivably may be a deposit or concealment of illicit liquor in an automobile with intent to defraud the United States of the tax upon it, which is not transportation within the meaning of §26 and to that extent the two sections are not in conflict. *But I cannot subscribe to those expressions in the opinion which seem to suggest that the two sections are not in direct conflict, in a case where there is transportation of liquor in a vehicle in violation of the National Prohibition Law with intent to defraud the*

> *United States of the tax. In that case, §26, it seems to me, plainly directs that the seizure shall be made and proceedings for forfeiture of the seized vehicle had under that section.* In that event Section 26 saved the interest of the innocent owner or lienor from the forfeiture required by Section 3450. *It appears to me that the conflict in such a case is direct and that Section 26 by its terms is controlling."* (Italics ours.)

In the dissenting opinion in the *Ford Coupe* case Mr. Justice Butler did not follow the majority of the Court in failing to consider the case as one involving a violation of Section 26, stating at page 344:

> "The opinion proceeds on the theory that transportation of whiskey in the automobile is not shown outside the claim of the Garth Motor Company. And it is held that, the dismissal being set aside, hearing on the question whether Killian was transporting the whiskey may be had in the lower court. It seems to me the litigation need not be so delayed, and that the important question pressing for decision should be decided now",

and considering this important question, deemed in 1926 to be pressing (and remaining in 1930 still undec'ded), Mr. Justice Butler goes on to state:

> "When the information was filed, the court issued a writ of attachment, commanding the marshal to attach the automobile 'which is now being held by Edgar N. Read, acting prohibition director', to detain it until the further order of the court and to give notice to the claimant. The marshal made his return that he had executed the writ by handing a copy to Acting Director Read and by seizing the automobile. December 6, 1923,

the claimant filed a motion to quash the libel. April 14, 1924, it filed its claim, alleging that the title to the automobile which was seized while being used by Killian 'in and about the unlawful transportation of intoxicating liquors' was in the company, subject to a conditional sales contract, and gave the bond provided for in §26, which was approved by the District Judge. The motion to quash was sustained and the libel was dismissed. The District Judge filed no opinion. The Circuit Court of Appeals affirmed the judgment. 4 F. (2nd) 528. In its opinion that court said: 'The position now taken by the government in this case is that the interest of an innocent owner or lien holder may be forfeited if the automobile is standing still, but that such interest is protected if the automobile is in motion. That view could easily result in manifest injustice; for under it, as an illustration, the interest of an innocent holder of a lien on an automobile could be forfeited upon proof that while it was parked on a public street liquor was concealed in it by someone who had the intent to defraud the government of its internal revenue tax.' And the court held that §3450 is superseded by §26 in so far as there is conflict between them. It dealt with the case as one involving a violation of §26.

I think the court's interpretation of the record was right. The prohibition agent discovered Killian in possession of an automobile containing 27 quarts of illicit whiskey in violation of the National Prohibition Act. The agent seized the vehicle; and, as it was his duty to do so, it must be found that he also seized the whiskey. The prosecution of Killian was commenced by filing complaint charging him with the crime of *illegal*

possession in violation of that act. The facts stated make out 'transportation'. * * * I am of the opinion that the decree should be affirmed. * * *

Section 26 directs the proceedings to be taken in respect of the vehicle 'whenever intoxicating liquors transported or possessed illegally shall be seized by an officer'. The libel brings the case within the words and meaning of the clause just quoted."

The dissenting opinion of Mr. Justice Butler received the concurrence of Mr. Justice McReynolds and Mr. Justice Sutherland.

In the *Port Gardner Company* case six questions were presented by the Certificate. The fifth question was: "Did the prosecution of the driver of the car under the National Prohibition Act constitute an election by the Government to proceed under Section 26 of the Act and thereby prevent the forfeiture of the car under Section 3450 of the Revised Statutes of the United States?"

The opinion of the Court delivered by Mr. Justice Brandeis considering the fifth question stated at page 566:

"The disposition of the automobile prescribed in §26 became mandatory after Neadeau's conviction; and being inconsistent with the disposition under §3450 necessarily precluded resort to proceedings under the latter section. Construing the fifth question as referring to the prosecution with effect, we answer the question in the affirmative.

We need not determine whether the mere commencement of a proceeding under §26 constitutes an election. Nor need we give specific answers to the other questions asked, since the certificate

does not disclose any reason why the sale of the automobile, subject to the interests of innocent parties, should not have been ordered by the District Court after the conviction of Neadeau."

So that as in the *Ford Coupe* case, the question we are interested in remained undecided.

In a concurring opinion, however, Mr. Justice Butler again, as in the *Ford Coupe* case, regretted the fact that the decision of the Court was qualified and restricted. The concurring opinion is short and follows in full:

> "I agree that the answer to question 5 should be in the affirmative.
>
> In the opinion it is said, 'Construing the fifth question as referring to the prosecution with effect, we answer the question in the affirmative.' This means prosecution and conviction of the driver constitute an election to proceed against the vehicle under §26 and prevent forfeiture under §3450. The answer is enough to guide the Circuit Court of Appeals in this case. But it leaves open the question which is not decided in No. 115. *The substance of that question is whether the prohibition officer discovering one in an act of transportation may disregard the plain and direct commands of §26 to proceed against the vehicle as there directed. I think he has no more right to ignore the command that he has to let the liquor and offender go. The law makes the election.* (Italics ours.) I regret that this Court's answer is so qualified and restricted. Section 26 is not so restrained.
>
> I am authorized to say that Mr. Justice Stone concurs in this opinion."

The final case considered by this Court, in which the issue here involved was raised but not decided, was that of *Commercial Credit Company* v. *United States*, 276 U. S. 226. In that case proceedings to forfeit an automobile under Section 3450 were brought after one Campbell, in charge of the automobile, having been prosecuted in the District Court under the National Prohibition Act on charges of unlawful possession and transportation of liquor, had pleaded guilty to unlawful possession, whereupon the Government had dismissed the charge of unlawful transportation.

The Circuit Court of Appeals, on the theory that Campbell's conviction of unlawfully possessing liquor was under Section 3 of Title II of the Prohibition Act, and therefore did not entail a disposition of the car under Section 26 of that title, held that the Government was at liberty to proceed under Section 3450 for the forfeiture of the automobile.

This Court reversed the decision of the Circuit Court of Appeals because the facts indicated that the possession, as to which he had pleaded guilty, was possession in transportation and that therefore under the doctrine of the *Port Gardner Investment Company* case the disposition of the car under Section 26 became mandatory after the conviction.

However, the Court in this *Commercial Credit* case, as in the *Port Gardner* case and in the *Ford Coupe* case, did not avail itself of the opportunity to answer the question propounded by Mr. Justice Butler in his concurring opinion in the *Port Gardner* case. The opinion delivered by Mr. Justice Sanford recites at page 231:

> "The claimant states that the question here presented is that which was referred to in a con-

curring opinion in the *Port Gardner Investment Company* case, namely, 'whether the prohibition officer discovering one in the act of transportation may disregard the plain and direct commands of §26 to proceed against the vehicle as there directed', and on that assumption the arguments have been largely directed to the question whether, whenever an officer discovers a person in the act of transporting intoxicating liquor in a vehicle, the provisions of §26 become mandatory in such sense as to furnish the exclusive remedy for the forfeiture of the vehicle. But, since it appears that the officer in fact seized the vehicle and arrested Campbell, who was in fact proceeded against under the Prohibition Act, the question of the officer's duty to proceed under §26 is not here involved."

CONCLUSION.

Accordingly we have the unique situation of presenting to this Court for consideration an issue as to which in various cases four of the Justices have already expressed views sustaining the argument of the petitioner. This circumstance, we submit, of itself is a compelling argument in support of petitioner's position.

Petitioner's contention is supported not alone by the cumulative effect of the judicial expressions of the several Justices of the Court to which we have referred, but as well by statute, by logic and by the dictates of fairness and justice. It is supported by statute in that the provisions of the National Prohibition Act, being inconsistent with certain provisions of the Revenue Law, are declared to have been repealed in favor of the former. It is supported by logic in that it is unreasonable to

assume that the Congress enacting a Prohibition Act in 1919 should have intended that a provision deliberately included in that Act be discarded for enforcement purposes in favor of an Act of 1866, the current use of which is so obviously designed to accomplish the general intent of the discarded section, while at the same time making nugatory and unavailable those provisions of that section which protect innocent lien holders. The Prohibition Act was designed to correct an evil and was never intended to be the instrument with which to visit forfeitures and penalties upon innocent persons. It is supported by fairness and justice since the drastic remedy of the Revenue Law is directed not alone against the transgressor, but against the innocent lienor, whose rights are so clearly intended to be guarded by the National Prohibition Act.

It is, we believe, a fair assumption that the conditions surrounding the passage of the Revenue Act were so different from those surrounding the passage of the Prohibition Act that this Court is justified in taking judicial notice of the differing conditions. The commercial and banking contacts in the period of 1866 were direct and simple and it is fairly inferable that vendors, vendees and mortgagees had opportunity to have reasonable notice of their respective purposes and intentions. We are now in a totally different age, in which such parties know nothing of each other and in most transactions do not even meet. Commercial and banking transactions are impersonally conducted, in fact cannot be conducted in any other manner. Trade, commerce and banking must be facilitated with rapid and intelligent service. This is fundamentally the age of transportation—the motor age. The mass production of motors and its complement, mass consumption, required

the creation of coordinated banking facilities for consumers, as the majority of motors are sold on credit with supporting liens on the motors so sold (see Prof. Edwin R. A. Seligman, MacVickar Professor of Political Economy, Columbia University, on "The Economics of Installment Selling"—Harper & Bro., 1927). Great banking institutions have arisen specializing in this type of credit. Subtract the credit sales of motors and this great industry would shrink in volume to its great damage and that of related and supporting industries. The framers of the Prohibition Act in drafting Section 26 must have had in mind the equitable protection of the banking institutions which in good faith, lawful purpose and innocence of conniving at infractions of law, finance motor lien paper to the extent of billions of dollars per annum. What good purpose can be subserved by visiting losses upon them by invoking the operation of a statute whose harshness was so obviously intended to be negatived by the terms of Section 26.

It may be pertinent to indicate to this Court that those who have suffered from the promiscuous use of Section 3450, bankers and automobile merchants, have no quarrel with the National Prohibition Act nor with its strict enforcement. They neither condone the offenses against it nor approve or support the offender. Great care is employed to finance only sound risks and to prevent automobiles from coming into possession of bootleggers, rum runners and other improper persons.

These forfeiture proceedings have resulted from those instances where, notwithstanding the care exercised to prevent it, cars have been purchased, generally through subterfuge, by those unlawfully engaged or those who purchase with intent of lawful use and later determine to engage in illegal acts.

Your petitioner, speaking for the automobile merchants and the special banking corporations which are interested, respectfully submits that justice cannot give countenance to permitting the resurrection of an ancient statute for the harsh enforcement of a modern statute to the injury of innocent persons whose rights that modern statute itself jealously preserves.

> "The damnable character of the 'bootlegger's' business should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods. 'To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; * * * in short, to procure an eminent good by means that are unlawful, is as little consonant to private morality as to public justice'."

Mr. Justice McReynolds, dissenting in *Carroll* v. *United States*, 267 U. S. 132, at 163.

It is submitted that the decree of the United States Circuit Court of Appeals for the Fourth Circuit should be reversed.

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REPLY BRIEF OF PETITIONER

FILE COPY

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CHARLES ELMORE

IN THE

Supreme Court of the United States.

OCTOBER TERM—1929

No. 452

RICHBOURG MOTOR COMPANY

Petitioner

—against—

UNITED STATES OF AMERICA

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This brief is filed in reply to the brief of the respondent.

I

The word "shall" as employed in Section 26 of the National Prohibition Act should be construed in a mandatory and not a discretionary sense.

Respondent contends that the word "shall" should be construed not in its usual mandatory sense of "must" but in the discretionary sense of the word "may".

While it is true that the word "shall" may sometimes be read to mean "may", it should not so be construed when used in a statute confiscatory or penal in its nature or where a public or private right would be impaired by such construction. See *Madison* v. *Daley*, 58 Fed. 751, at page 753, where the Court stated:

"Where the public or third persons have a claim *de jure* that the act shall be done, it is imperative and will be construed to mean must".

The Espionage Act (June 15, 1917, c. 30, 40 Stat. 217) contained a forfeiture provision somewhat similar to Section 26. The provision was considered and a similar use of the word "shall" construed in *United States* v. *267 Twenty-Dollar Gold Pieces,* 255 Fed. 217. The opinion recites:

> "Concisely stated, the act provides that after seizure, within 10 days, the person making the seizure shall on oath or affirmation apply to the District Judge for a warrant to justify the detention of the seized property, and, if the judge refuses to issue the warrant, or application therefor is not made within 10 days after the seizure, the property shall forthwith be restored to the owner or person from whom seized.
>
> A statutory power to divest the owner of title to the property is here enacted, and I think the mode of procedure prescribed by the act creating this power is complete, and must be strictly construed and that the provisions are mandatory as to the essence of the thing to be done. *Franklin Glass Co.* v. *White,* 14 Mass. 286; *Monk* v. *Jenkins,* 2 Hill's Eq. (S. C.) 9.
>
> A new power was here created, and means to execute it provided. The statute expressly says he shall apply for a warrant within ten days after seizure, and, on failure, shall forthwith restore to the owner the property seized.
>
> 'Where a statute declares a thing shall be done, it is a peremptory mandate.' Bouvier's Dictionary.

> 'Shall', ought undoubtedly to be construed as meaning 'must', for the purpose of sustaining or enforcing an existing right." *W. W. R. Co.* v. *Foley,* 94 U. S. 100, at page 103 (24 L. Ed. 71).
>
> "While it is said in *Railroad Co.* v. *Hecht,* 95 U. S. 168, 24 L. Ed. 423, that as against the government, the word 'shall', when used in statutes, is to be considered as 'may', unless the contrary intention is manifest, here the contrary intention is manifest."

Attentive examination of Section 26 fortifies petitioner's construction of the word "shall" in the injunctive sense of "must".

If the word "shall" as used in Section 26 were given the discretionary interpretation urged by respondent we would have the absurd result of a statute providing that "when the Commissioner, his assistant, inspectors or any officer of the law shall discover any person in the act of transporting in violation of the law intoxicating liquors in any wagon, automobile, water or air craft or other vehicle, it *may* be his duty to seize any and all intoxicating liquors found therein being transported contrary to law".

It is obvious that such an interpretation will not lie. Indeed if the wording were "he shall seize", instead of "it shall be his duty to seize", the word "shall" would obviously require a mandatory interpretation. But the very use of the term "it shall be *his duty* to seize", eliminates any possible doubt as to whether Congress intended that the provision should be mandatory.

The next sentence of Section 26, if given a discretionary construction, would require the following reading: "Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he *may*

take possession of the vehicle and team or automobile, boat, air or water craft or any other conveyance and *may* arrest any person in charge thereof".

This construction is illogical since it would permit an officer discovering a violation of the law to exercise his discretion as to whether or not to arrest the person unlawfully engaged.

Reading further in Section 26 it becomes evident that the very next sentence requires beyond all question a mandatory and not a discretionary construction of the preceding sentence. For *it assumes that the arrest shall have been made,* to wit, "* * * and shall arrest any person in charge thereof. Such *officer shall at once proceed* against the person arrested *under the provisions of this title* in any court having competent jurisdiction". CAN THIS POSSIBLY MEAN THAT THE OFFICER *MAY* AT ONCE PROCEED? OR THAT HE MAY PROCEED UNDER SOME OTHER STATUTE?

The respondent has sought to direct the attention of the Court to the effect on other statutory provisions of a mandatory interpretation in the case at bar, of Section 26. It may not necessarily follow that the construction sought to be placed on this section would preclude the use by the Government of the other statutes referred to in the brief of the respondent. But even if that result were to follow the fact remains that Section 26 must be construed as enacted. If some of the results of the enactment prove to have been unanticipated, that is a matter which should properly concern Congress. See *United States* v. *Union Pacific R. R. Co.,* 91 U. S. 224, 233.

II

The mandatory requirements of Section 26 provide the conflict between Section 26 and Section 3450 upon which petitioner relies.

The brief of respondent at page 11 recites that "the sole basis of petitioners' contention of conflict and of the decisions relied on by them is that Section 26 saves the interests of the innocent lienor or owner from the forfeiture required by Section 3450".

Petitioner in the case at bar has not apparently made clear to respondent the basis of petitioner's contention of conflict.

Petitioner contends that there is a conflict between Section 26 and Section 3450 by reason of the fact that Section 26 by mandatory language requires that proceedings must be brought under Section 26 whenever a violation of Section 26 is discovered. Being mandatory the section excludes recourse to the earlier enacted Section 3450, where a violation of both sections is discovered. Excluding recourse to Section 3450 in such a case it is petitioner's contention that Section 26 is therefore in conflict with Section 3450.

The brief of respondent urges that if an election between the statutes may be made the United States Attorney and not the arresting officer shall determine the election. This issue is not embraced in the specification of errors now before the Court.

It is the practice upon making an arrest for the officer to take the person arrested before a United States

Commissioner. It is respectfully submitted that the charge which is made before the United States Commissioner is the charge which the Government should be deemed to have elected. In short, it is not a question of who should make the election but of what election is in fact made.

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No. 452

In the Supreme Court of the United States

OCTOBER TERM, 1929

RICHBOURG MOTOR COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court. The per curiam opinion of the Circuit Court of Appeals (R. 18) is reported in 34 F. (2d) 38.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 22, 1929. (R. 20.) The petition for certiorari was filed October 21, 1929. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Where an automobile is seized while being used in the transportation of intoxicating liquor in violation of the National Prohibition Act and there has been no conviction therefor under that Act, may forfeiture proceedings be maintained under Section 3450, Revised Statutes, for use of the car to evade Internal Revenue taxes on the liquor, or does Section 26, Title II, of the National Prohibition Act afford the exclusive remedy for the disposition of the car? In other words, where transportation is involved, are Sections 26 and 3450 in direct conflict so that the former, to the extent of such conflict, repeals the latter?

An incidental question involved is whether the Government is bound by the action of the arresting officer, or whether the prosecuting attorney may elect to proceed under any statute which may have been violated or provides for a forfeiture.

STATUTES INVOLVED

The statutes involved are set forth in an appendix to this brief.

STATEMENT

The automobile in question was seized by a Federal Prohibition Agent while it was being driven along the public highway by a Mrs. Bryson in company with two other persons. It was found to contain twelve and one-eighth gallons of moonshine whiskey on which the tax had not been paid. The

officer testified: "I knew Mrs. Bryson, the girl in the car, and was suspicious of the car. I saw it going down the road and watched for it as it came back. Then I saw it coming back up the road and stopped the car on the main highway and made an investigation and found this liquor in the car." The officer took possession of the car and arrested the occupants, whom he took before a United States Commissioner, where they were charged with transportation and possession of whiskey in violation of the National Prohibition Act. The United States Attorney, however, did not proceed with this charge, but secured an indictment against the occupants of the car under Section 3296, Revised Statutes, for removing and concealing spirits on which the tax was not paid (R. 7), and filed a libel in the District Court for the Western District of North Carolina against the car seeking its forfeiture under Section 3450, Revised Statutes, because it had been used in the removal and for the deposit and concealment of the whiskey in question with intent to defraud the United States of the tax thereon. (R. 1–3.)

The petitioner, the Richbourg Motor Company, intervened in the libel proceedings, claiming the car as an innocent holder of an unsatisfied purchase-money lien thereon for $417, petitioner having sold the car under a conditional sales contract to a Mrs. Hunnicutt who, it appears, had loaned the car to one of the occupants thereof at the time of its seizure. (R. 3–5.)

At the close of all the evidence, the intervenor, Richbourg Motor Company, moved to dismiss the libel on the ground, among others, that the United States had elected to proceed under the National Prohibition Act and was barred from proceeding under Section 3450, Revised Statutes, and on the further ground that, since the prohibition officer had discovered persons in the act of transporting intoxicating liquor, the National Prohibition Act made it mandatory to proceed under that Act. The motion was overruled by the trial court.

The intervenor then tendered the following issue: "Was the Ford Coupe, Motor No. 14,444,150, actually engaged in transporting liquor and were persons in the car and arrested at the time of the seizure of said car?" The court declined to submit this issue to the jury because it was "not raised by the pleadings in the case for the determination of the law question involved."

The court declared there was but one issue, which it submitted to the jury, namely, "Was the Ford Coupe Motor No. 14,444,150 engaged in the removing and concealing of untaxpaid liquor as alleged in the libel?" This issue was answered in the affirmative. (R. 6, 8, 9, 11.)

The court thereupon gave judgment for the forfeiture to the United States of the bond for $350 theretofore given by the Richbourg Motor Company for the release to it of the automobile in question. (R. 10.) On appeal to the Circuit Court of

Appeals the judgment was affirmed in a per curiam opinion. (R. 18, 20.)

ARGUMENT

In *United States* v. *One Ford Coupe,* 272 U. S. 321, it was held, where transportation was not involved, that Section 3450, Revised Statutes, could be applied to forfeit a vehicle used as a place of concealment and deposit of intoxicating liquor for the purpose of evading an internal-revenue tax. In *Port Gardner Investment Company* v. *United States,* 272 U. S. 564, it was held that where transportation was involved and there had been a conviction therefor under the National Prohibition Act, disposition of the car under Section 26 of that Act became mandatory, and resort to proceedings under Section 3450 was precluded. In *Commercial Credit Co.* v. *United States,* 276 U. S. 226, it was held that where there was a conviction of unlawful possession of intoxicating liquor, which possession was incidental to the transportation, the vehicle must be disposed of under Section 26. None of these cases decided the question here involved, namely, whether forfeiture proceedings must be brought under Section 26 where transportation is involved but there has been no conviction under the National Prohibition Act.

In the instant case the car was discovered while being used in the transportation of liquor. There was, however, no conviction under the National

Prohibition Act. While the arresting officer charged the occupants of the car with transportation and possession in violation of that Act, the District Attorney, not feeling himself bound by the action of the arresting officer, elected to proceed against the occupants of the car and the car itself under the internal revenue laws, with the result that the car and the innocent claimant's interests therein were forfeited. This proceeding was approved by the court below, which declared that, where there has been no election to prosecute the guilty parties under the National Prohibition Act, the Government may proceed under Section 3450, and that against such proceedings the rights of an innocent lien claimant will not prevail. In disposing of the case the court referred to its prior opinion in a similar case, *United States* v. *Commercial Credit Co.*, 20 F. (2d) 519, where it said (pp. 520-521):

> There had been no conviction under the National Prohibition Act, as was the case in *Port Gardner Inv. Co.* v. *United States*, 47 S. Ct. 165, 71 L. Ed. —. And an information had not been filed against the guilty parties, as had been done in *Commercial Credit Corporation* v. *United States* (C. C. A. 2d) 18 F. (2d) 927. The question, therefore, is simply whether a proceeding under R. S. Sec. 3450, is barred merely because a prohibition agent has made an arrest and seizure and caused a warrant to be issued charging violation of the National Prohibition Act, and a United

States commissioner has bound over to court the persons so arrested to answer to the charge contained in the warrent. We think that this question must be answered in the negative.

Section 5 of the Act of November 23, 1921, 42 Stat. 222 (Comp. St. Sec. 10138–4/5c), under which the old internal revenue laws with respect to intoxicating liquors are retained in force, provides that " if any act is a violation of any of such laws and also of the National Prohibition Act or of this act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other." It will thus be seen that it is a conviction, and not a prosecution, under one act, which is a bar to a prosecution under the other; and, while we do not pass upon the question as to whether the filing of an information under the National Prohibition Act would constitute such an election of remedies as would bar a proceeding under R. S. Sec. 3450, it seems perfectly clear that the government is not precluded from proceeding under R. S. Sec. 3450, by a seizure made by a prohibition officer, or papers issued by a United States commissioner in advance of any action by the United States attorney. In such case there is no election by prosecution under the Prohibition Act; for the prosecution is not commenced until an indictment is found or information filed. * * *

* * * * *

The United States attorney is the law officer authorized to speak in behalf of the government. It would greatly hamper him in

the performance of his duties to be bound by the conclusions of prohibition agents and United States commissioners. Let a case be supposed where a seizure has been made and a warrant issued under the National Prohibition Act, but where the parties charged are not guilty of violating that act, but are guilty of a violation of the internal revenue laws and have incurred a forfeiture thereunder. Is the district attorney in such case to be precluded from proceeding with a proper prosecution, and are the guilty parties to escape, because of the mistaken action of the prohibition agent and the commissioner? Or in case the act complained of constitutes a violation of both the revenue laws and the Prohibition Act, and a warrant is issued under the latter, but it becomes impossible to secure a conviction thereunder because of the escape of the guilty party, are the hands of the government to be tied, so that it cannot proceed to enforce the forfeiture against the property incurred by violation of the revenue laws, merely because a prohibition agent has secured a warrant under the Prohibition Act? To ask these questions is to answer them; and to our minds they demonstrate the unsoundness of the suggestion that, by action of a prohibition agent or a United States commissioner, the government is to be held to have made an election of remedies, and is to be precluded from prosecuting crimes denounced by its laws or forfeitures incurred thereunder. The fact that the statute directs that, upon

an arrest and seizure under the Prohibition Act, the officer of the law shall proceed against the person arrested, in a court of competent jurisdiction, manifestly was not intended to preclude a prosecution for other crimes of which the person arrested might be guilty, or to make such action by the officer an election by the government to proceed under the Prohibition Act instead of under the internal revenue laws, if the act of which accused was guilty constituted a violation of both.

On the other hand, the Circuit Court of Appeals for the Fifth Circuit, in *United States* v. *General Motors Acceptance Corporation,* 25 F. (2d) 238, held that where a person is discovered in the act of transporting liquor in a vehicle in violation of the National Prohibition Act, Section 26 makes it mandatory upon the Government to proceed against the person and the vehicle as therein provided and there is no authority of law to forfeit the vehicle under Section 3450. The court said (p. 239):

> Assuming that it is possible to prove that one who uses a vehicle in the removal or for the deposit or concealment of untax-paid liquor has the necessary intent under section 3450 to defraud the United States of a tax which existing law neither requires nor permits to be paid, it is nevertheless true that, if a person be caught in the act of unlawfully transporting liquor in a vehicle, there is no authority of law to proceed under section 3450, either to prosecute the person or

to forfeit the vehicle. Under such circumstances it is apparently recognized in *United States* v. *One Ford Coupe, supra,* that section 26 is exclusively applicable. In that case it was said that there was no allegation that the automobile had been discovered or was being used in unlawful transportation, or that the driver had been prosecuted. Here there was proof or admission that the driver was discovered by the arresting officers in the act of illegal transportation of liquor in the automobile sought to be forfeited.

After referring to this Court's decisions in the *Port Gardner* and *Commercial Credit Company cases, supra,* the court proceeded (p. 240):

> It is apparent from these recent decisions that the Supreme Court has not passed upon a case in all respects like the one before us. The record in this case, either designedly or by unintentional omission, fails to disclose whether Girdner was tried, either under the Internal Revenue Law or under the National Prohibition Act. But in our opinion the proceedings taken after the arrest and seizure are immaterial, as it was the duty of the government under the plain terms of section 26 to prosecute him for unlawful possession or transportation.

See also *United States* v. *Milstone* (C. A. D. C.), 6 F. (2d) 481; *United States* v. *One Dodge Sedan* (Utah), 21 F. (2d) 971.

In the *Ford Coupe case, supra,* this Court held that there was no direct conflict between Sections

26 and 3450, so that the former repealed the latter, at least where no transportation was shown, and we submit that no conflict results where transportation is involved. We do not believe that Congress intended, merely because transportation is disclosed, to deprive the Government of the use of any law which would ordinarily be available to it in the enforcement of the liquor as well as other statutes, such as internal revenue, customs and navigation. The argument that the two sections are in direct conflict when transportation occurs, and that the Government has no choice but must proceed under Section 26, is based largely upon the alleged mandatory character of Section 26 resulting from the use of the word "shall" in the section. The word "shall" has frequently been construed as meaning "may" when used in other statutes, and we submit it should be so construed here. If Section 26 is not construed as mandatory and therefore exclusive, the argument that a conflict exists loses its force. A provision in one statute authorizing forfeiture of guilty interests in a car used for illegal transportation is not in direct conflict with another statute providing that the whole value of the vehicle may be forfeited if used in violation of the revenue, customs or navigation laws.

The construction of Section 26 as compulsory and exclusive in all cases where transportation is involved because of the use of the word "shall" would result in consequences which could hardly have been intended. For example, if the driver of a vehicle

used to transport liquor illegally escapes, or if witnesses die or fail to identify him, no forfeiture of the car can result, because under Section 26 conviction of the individual must first be had. Section 3450 or any other statute under which the vehicle might be forfeited can not be invoked. If a vehicle is used to conceal liquor on which the tax is unpaid, complete forfeiture may be had; but if to the offense of tax evasion is added the offense of transportation without a permit, a less severe forfeiture results. Where a vehicle is used to smuggle intoxicating liquor, and is seized while transporting such liquor across an international border, it may be forfeited only under Section 26, although the offense of smuggling, entailing a complete forfeiture, has been simultaneously committed. Again, if a vehicle carries both liquor and smuggled merchandise, it is used in transporting liquor in violation of the National Prohibition Act and in smuggling merchandise, and yet Section 26 must be resorted to rather than the statutes incurring a greater forfeiture. So, a vehicle seized while being used in smuggling narcotics or diamonds may be completely forfeited, but if used in smuggling liquor so that transportation results, innocent interests must be protected. In short, where a vehicle or vessel is used in the illegal transportation of liquor, the Government is precluded from securing a forfeiture not only under Section 3450 for tax evasion, but under any other statute imposing a forfeiture for some other simultaneous offense, such as under the customs or navi-

gation laws, where the interests of innocent encumbrancers are not saved.

If by reason of the language used, proceedings under Section 26 are held to be mandatory and exclusive in all transportation cases, there is of course no election. Section 26 should not be so construed, but it should be left open to the Government to proceed under any of the above statutes, if not under all, where distinct offenses under each are disclosed. Moreover, we submit that the right of election should be with the prosecuting attorney, as held by the court below, and he should not be bound by the action of the arresting officers. He is responsible for and has charge of ultimate prosecutions. *The Jugoslavia,* 21 F. (2d) 99.

It is settled that the disposition of the vehicle prescribed in Section 26 becomes mandatory upon a conviction for transportation, or for possession incidental to transportation, and resort to forfeiture under Section 3450 can not be had. At what stage of the proceedings short of conviction the prosecuting officer may elect under which statute he will proceed has not been definitely decided. In the *Port Gardner case, supra,* this Court found it unnecessary to determine whether the mere commencement of a proceeding under Section 26 constitutes an election, but a prosecution resulting in a plea of guilty was construed as a "prosecution with effect" and as resulting in an election. In *Commercial Credit Corporation* v. *United States* (C. C. A. 2d), 18 F. (2d) 927, it

was held that the filing of an information constituted an election. Under Section 26 it is the conviction of the person arrested that determines the disposition of the vehicle. Likewise, Section 5 of the Act Supplemental to the National Prohibition Act takes no account of the mere commencement of a proceeding, but provides that, as to offenses which constitute a violation of the liquor laws in force before the National Prohibition Act as well as of that Act or the Supplemental Act, only a conviction under one statute shall bar a prosecution under the other.

CONCLUSION

Notwithstanding these considerations, in view of the conflict of decisions involved, and because the questions presented are constantly arising in the enforcing of prohibition, the Government does not oppose the petition.

Respectfully submitted.

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Solicitor General.

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Special Assistant to the Attorney General.

MAHLON D. KIEFER,
Chief Attorney.

W. MARVIN SMITH,
Attorney.

NOVEMBER, 1929.

APPENDIX

For the convenience of the Court the following statutes are set forth below:

Section 26, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 315 (U. S. C., Title 27, Sec. 40):

> When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or aircraft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved

by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or aircraft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills

posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

Sec. 35, p. 317 (U. S. C., Title 27, Sec. 52):

All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

* * * * * *

Section 5 of the Supplemental Act of November 23, 1921, c. 134, 42 Stat. 222, 223 (U. S. C., Title 27, Sec. 3):

> That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. * * *

Section 3450 of the Revised Statutes (U. S. C., Title 26, Sec. 1181):

> Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained, such goods or

commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited. And every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than five hundred dollars. And all boilers, stills, or other vessels, tools and implements, used in distilling or rectifying, and forfeited under any of the provisions of this Title, and all condemned material, together with any engine or other machinery connected therewith, and all empty barrels, and all grain or other material suitable for distillation, shall, under the direction of the court in which the forfeiture is recovered, be sold at public auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of according to law. And all spirits or spirituous liquors which may be forfeited under the provisions of this Title, unless herein otherwise provided, shall be disposed of by the Commissioner of Internal Revenue as the Secretary of the Treasury may direct.

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Nos. 452 and 569

In the Supreme Court of the United States

OCTOBER TERM, 1929

RICHBOURG MOTOR COMPANY, INTERVENOR, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

DAVIES MOTORS, INC., PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 452

RICHBOURG MOTOR COMPANY, INTERVENOR, petitioner

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DAVIES MOTORS, INC., PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court in No. 452. The *per curiam* opinion of the Circuit Court of Appeals (R. 15) is reported in 34 F. (2d) 38.

In No. 569 no opinion was rendered by the District Court. Its findings of fact and conclusions of law will be found in the Record, pp. 26–30. The opinion of the Circuit Court of Appeals (R. 52) is reported in 35 F. (2d) 928.

JURISDICTION

In No. 452 the judgment of the Circuit Court of Appeals was entered July 22, 1929. (R. 16.) The petition for certiorari was filed October 21, 1929, and was granted December 2, 1929. (R. 17.)

In No. 569 the decree of the Circuit Court of Appeals was entered November 12, 1929. (R. 61.) The petition for certiorari was filed January 13, 1930. On February 24, 1930, the petition was granted and the case assigned with No. 452 for argument as one case. (R. 63.)

The petitions for certiorari were applied for and granted under the provisions of Section 240 (a), Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Where an automobile is seized while being used in the transportation of intoxicating liquor in violation of the National Prohibition Act and there has been no conviction therefor under that Act, may forfeiture proceedings be maintained under Section 3450, Revised States (U. S. C., Title 26, Sec. 1181), for use of the car to evade Internal Revenue taxes on the liquor, or does Section 26, Title II, of the National Prohibition Act (U. S. C.,

Title 27, Sec. 40) afford the exclusive remedy for the disposition of the car? In other words, where transportation is involved, are Sections 26 and 3450 in direct conflict so that the former to the extent of such conflict, repeals the latter?

A second question involved is whether the action of the arresting officer in bringing the occupants of the vehicle before a United States Commissioner and charging them with possession and transportation of liquor, in violation of the National Prohibition Act, is an election binding upon the Government to proceed only under that statute, or whether the United States Attorney, upon learning of the arrest, may drop the proceeding under the Prohibition Act and proceed for the forfeiture of the vehicle under Section 3450, Revised Statutes (U. S. C. Title 26, Sec. 1181).

STATUTES INVOLVED

The statutes involved are set forth in an appendix to this brief, pp. 33–38, *infra*.

STATEMENT

No. 452, Richbourg Motor Company

The automobile in this case was seized by a Federal Prohibition Agent while it was being driven along the public highway by a Mrs. Bryson in company with two other persons. It was found to contain twelve and one-eighth gallons of moonshine whiskey on which the tax had not been paid. The officer testified: "I knew Mrs. Bryson, the girl in

the car, and was suspicious of the car. I saw it going down the road and watched for it as it came back. Then I saw it coming back up the road and stopped the car on the main highway and made an investigation and found this liquor in the car." The officer took possession of the car and arrested the occupants, whom he took before a United States Commissioner, where they were charged with transportation and possession of whiskey in violation of the National Prohibition Act. The United States Attorney did not proceed with this charge, but secured an indictment against the occupants of the car under Section 3296, Revised Statutes (U. S. C., Title 26, Sec. 404), for removing and concealing spirits on which the tax was not paid (R. 5–6), and filed a libel in the District Court for the Western District of North Carolina against the car seeking its forfeiture under Section 3450, Revised Statutes, because it had been used in the removal and for the deposit and concealment of the whiskey in question with intent to defraud the United States of the tax thereon. (R. 1–2.)

The petitioner, the Richbourg Motor Company, intervened in the libel proceedings, claiming the car as an innocent holder of an unsatisfied purchase-money lien thereon for $417, petitioner having sold the car under a conditional sales contract to a Mrs. Hunnicutt who, it appears, had loaned the car to one of the occupants thereof at the time of its seizure. (R. 2–4.)

At the close of all the evidence, the intervenor, Richbourg Motor Company, moved to dismiss the libel on the ground, among others, that the United States had elected to proceed under the National Prohibition Act and was barred from proceeding under Section 3450, Revised Statutes, and on the further ground that, since the prohibition officer had discovered persons in the act of transporting intoxicating liquor, the National Prohibition Act made it mandatory to proceed under that Act. The motion was overruled by the trial court. (R. 7.)

The intervenor then tendered the following issue: "Was the Ford coupe, Motor No. 4,444,150, actually engaged in transporting liquor and were persons in the car and arrested at the time of the seizure of said car?" The court declined to submit this issue to the jury because it was "not raised by the pleadings in the case for the determination of the law question involved." (R 7–8.)

The court declared there was but one issue, which it submitted to the jury, namely, "Was the Ford Coupe Motor No. 14,444,150 engaged in removing and concealing untaxpaid liquor as alleged in the libel?" (R. 5, 8.) This issue was answered in the affirmative. (R. 5, 8.)

The court thereupon gave judgment for the forfeiture to the United States of the bond for $350 theretofore given by the Richbourg Motor Company for the release to it of the automobile in question. (R. 8–10.) On appeal to the Circuit

Court of Appeals the judgment was affirmed in a *per curiam* opinion (R. 15–17), and certiorari was granted by this Court.

No. 560, Davies Motors, Inc.

The facts in this case are substantially the same as those in No. 452. The case arose by a seizure by a Federal prohibition agent of an automobile used in the illegal transportation of liquor and an arrest of the person in charge thereof for transportation and possession in violation of the National Prohibition Act upon a complaint filed before a United States Commissioner. (R. 18–19, 20–23, 26–28.) No further proceedings appear to have been taken under that Act. Subsequently, an information was filed charging the person in possession of the car and the liquor with a violation of the criminal provisions of Section 3450, Revised Statutes, to which he pleaded guilty and was fined. (R. 23, 28.) A libel against the car seeking its forfeiture under Section 3450, Revised Statutes, was filed on the ground that it had been used in the deposit and concealment of distilled spirits with intent to defraud the Government of the taxes thereon. (R. 3.) The petitioner, Davies Motors, Inc., intervened in these proceedings, claiming title to the car under a contract of conditional sale. (R. 7.)

Upon its findings of fact and conclusions of law the District Court decreed the automobile forfeited to the United States. (R. 30–32.) In affirming the

decree of forfeiture the court below reviewed the decisions of the Circuit Court of Appeals for the Fourth Circuit in No. 452 and other cases in that Circuit upholding forfeitures under Section 3450 upon a similar state of facts, as well as the decision of the Circuit Court of Appeals for the Fifth Circuit in *United States* v. *General Motors Acceptance Corporation*, 25 F. (2d) 238, where the opposite conclusion was reached, and followed the decisions and line of reasoning of the Circuit Court of Appeals for the Fourth Circuit. (R. 52–61.) Upon application of the petitioner certiorari was granted by this Court.

SUMMARY OF ARGUMENT

Section 26 of the National Prohibition Act is not mandatory in the sense that proceedings under it are compulsory, and therefore exclusive, in the case of a car seized while used in violation of the provisions of Section 3450 of the Revised Statutes.

While Section 26 protects innocent interests, Congress did not intend by its enactment to extend such protection to property subject to forfeiture under Section 3450, or any other statute, merely because transportation of liquor happens to be an element common to the cause of forfeiture under the respective statutes. When acts complained of give rise to causes of forfeiture under two statutes, authority is complete to proceed under either unless the later statute is for the same offense or is otherwise so far inconsistent with the earlier as im-

pliedly to repeal it. Sections 26 and 3450 do not deal with the same offenses. Intent to defraud the United States of its revenues characterizes the latter but is not essential to the former; and the mere fact that transportation (removal) of liquor is an element common to both does not make them the same. Identity of offense therefore can not support the implication of repeal. Nor are the sections "directly in conflict." (Willis-Campbell Act, c. 134, Sec. 5, 42 Stat. 222, 223; U. S. C. Title 27, Sec. 3.) Variation of legal consequence dependent on intent is sufficient to remove all suggestion of conflict or inconsistency.

But it is argued that Section 26 provides that the arresting officer "shall at once proceed against the person arrested under the provisions of this title," and that consequently once a case is made presenting facts sufficient to warrant proceedings under Section 26 there can be no proceedings under any other law. To construe this provision either as mandatory or exclusive would lead to the most extraordinary results by extending immunity to all offenses under Federal statutes in the course of the commission of which there is transportation of liquor. If there has been no repeal of Section 3450, and if the language of Section 26 is neither mandatory nor exclusive, then we contend that there was no election binding upon the United States to proceed only under Section 26 in these cases.

ARGUMENT

I

SECTION 26 OF THE NATIONAL PROHIBITION ACT IS NOT MANDATORY IN THE SENSE THAT PROCEEDINGS UNDER IT ARE COMPULSORY AND EXCLUSIVE WHERE TRANSPORTATION IS INVOLVED, AND THERE IS NO CONFLICT BETWEEN IT AND SECTION 3450, REVISED STATUTES

In *United States* v. *One Ford Coupe*, 272 U. S. 321, it was held, where transportation was not involved, that Section 3450, Revised Statutes, could be applied to forfeit a vehicle used as a place of concealment and deposit of intoxicating liquor for the purpose of evading an internal-revenue tax. In *Port Gardner Investment Company* v. *United States*, 272 U. S. 564, it was held that where transportation was involved and there had been a conviction therefor under the National Prohibition Act, disposition of the car under Section 26 of that Act became mandatory, and resort to proceedings under Section 3450 was precluded. In *Commercial Credit Co.* v. *United States*, 276 U. S. 226, it was held that where there was a conviction of unlawful possession of intoxicating liquor, which possession was incidental to the transportation, the vehicle must be disposed of under Section 26. None of these cases decided the question here involved, namely, whether forfeiture proceedings must be brought under Section 26 where transportation is involved but there has been no conviction under the National Prohibition Act.

In the instant cases the cars were seized while being used in the transportation of liquor, but there was no conviction under the National Prohibition Act. While the arresting officers charged the drivers and occupants of the cars with transportation and possession in violation of that Act, the respective District Attorneys, not feeling themselves bound by the action of the arresting officers, elected to proceed against the occupants of the cars and the cars themselves under the internal revenue laws, with the result that the cars and the innocent claimants' interests were forfeited. This proceeding was approved by both District Judges and both Circuit Courts of Appeals, which declared in effect that, where there has been no election to prosecute the guilty parties under the National Prohibition Act, the Government may proceed under Section 3450, and that against such proceedings the rights of an innocent lien claimant will not prevail.

Petitioners contend that these decisions are erroneous for the reasons that, where transportation is involved, Section 3450, Revised Statutes, is in direct conflict with Section 26 of the National Prohibition Act and was not reenacted by Section 5 of the Willis-Campbell Act of November 23, 1921, c. 134, 42 Stat. 222, 223 (U. S. C., Title 27, Sec. 3), and that in such cases the provisions of Section 26 are mandatory and the Government has no right of election to forfeit the car under any other statute.

The Government contends that there is no such conflict between Section 3450, Revised Statutes, and the National Prohibition Act as to render it mandatory upon the Government officers to proceed under the latter Act, where the facts of the offense constitute also a violation of the former statute. The evidence found by the officers at the time of the arrests and seizures in these cases rendered the defendants liable to prosecution under Section 3296, Revised Statutes, and the criminal provisions of Section 3450, Revised Statutes, and the automobiles subject to libel and forfeiture under Section 3450. These propositions are predicated on the theory that these two sections of the revenue laws were in force and effect at the time the offenses were committed and that they are not in conflict with the provisions of the National Prohibition Act. If, as petitioners contend, there is such direct conflict, then the Government should have proceeded under the latter Act. On the other hand, if there is no such direct conflict, then the Government submits it had the right to choose either remedy.

The sole basis of petitioners' contention of conflict and of the decisions relied on by them is that Section 26 saves the interests of the innocent lienor or owner from the forfeiture required by Section 3450. We submit that this is not sufficient to show a conflict in all cases of transportation. If a case otherwise comes within the provisions of Section 3450, a conflict does not necessarily result merely

because transportation is also involved which, in a proper case brought under Section 26, would save the innocent interests. The interest of an innocent owner or lienor in property used to transport liquor may be forfeited. See *Van Oster* v. *Kansas*, 272 U. S. 465. As in that case, petitioners here entrusted their property to a wrongdoer. The Court there points out (p. 467) that it is not uncommon for the law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one to whom he has entrusted it. The Court also refers to the cases of *United States* v. *One Buick Roadster Automobile*, 244 Fed. 961, and *United States* v. *One Seven-Passenger Paige Car*, 259 Fed. 641, where the innocent interests of lienholders in automobiles used to introduce liquor into the Indian Territory in violation of Section 2140, Revised Statutes, were forfeited. There would appear to be nothing unusual, therefore, about the forfeiture of innocent interests in transportation cases. While it is true that Section 26 protects innocent interests in proceedings brought under it in a proper case, Congress may well have intended that such interests should not be saved in a case properly falling within Section 3450 or some other statute, merely because transportation is also involved. In fact, this Court, in *United States* v. *One Ford Coupe, supra*, pointed out that Section 26 does not protect innocent interests generally, but applies only to cases of forfeiture incident to the

prosecution as therein provided. The Court said (pp. 332–333):

> The claimant contends that Section 26 has modified Section 3450, as applied to intoxicating liquors, so as to deny a forfeiture of the interest in the vehicle of one who had no guilty knowledge that it was to be used for an illegal purpose. That there was no such protection of the innocent interest prior to the National Prohibition Act is conceded. *Goldsmith, Jr.-Grant Co.* v. *United States,* 254 U. S. 505. That since the Willis-Campbell Act, Congress has not intended to restrict any remedy theretofore given in aid of the revenue laws is clear. *The argument that by Section 26 Congress manifested the intention to protect generally innocent interests is unfounded.* The section is narrow in scope. The protection accorded is stated explicitly. It does not apply generally to violations of the Prohibition Act, *nor to the violation of any provision of the revenue laws.* It applies solely to *cases of forfeiture incident to the prosecution, as therein provided,* of a person transporting liquor by a vehicle in violation of the Prohibition Act. (Italics ours.)

After the passage of the National Prohibition Act considerable doubt prevailed as to whether the Act superseded the old internal revenue laws relating to taxation of distilled spirits. The question finally reached this Court in *United States* v. *Yuginovich,* 256 U. S. 450, where it was held that

the new Act had the effect of repealing certain provisions of those laws. This decision was rendered June 1, 1921. On November 23, 1921, Congress, with manifest intention of counteracting the effect of this decision (*United States* v. *Stafoff*, 260 U. S. 477), adopted an Act supplemental to the National Prohibition Act, known as the Willis-Campbell Act, Section 5 of which provides, in part:

> That all laws in regard to the manufacture and *taxation of* and *traffic in* intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and *continue in force*, as to both beverage and nonbeverage liquor, except such provisions of such laws as are *directly in conflict* with any provision of the National Prohibition Act or of this Act; *but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other.* (Italics ours.)

It would seem to be clear from the latter part of this section, as above quoted, that Congress recognized the fact that cases might arise, like those at bar, where the facts would constitute a violation of the revenue laws as well as of the National Prohibition Act; that in such cases prosecution might be had under either statute, but that a prosecution under one statute should bar a prosecution under the other. The language of this statute itself would

seem to suggest the implied authority on the part of the Government to exercise the right of electing under which statute it will proceed, when the facts of the offense constitute a violation of both.

Section 3296, Revised Statutes, under which the Government proceeded in case No. 452, makes it unlawful for any person to remove or conceal distilled spirits on which the tax has not been paid. Section 3450, under which the defendant in No. 569 was prosecuted, makes it unlawful for any person to remove, deposit, or conceal any goods or commodities for or in respect of which any tax is imposed, where the act of removal, deposit or concealment is committed with intent to defraud the Government of the tax thereon, and it also provides for the forfeiture of vehicles and other instrumentalities used in such removal, deposit, or concealment. A tax is still due on distilled spirits, whether legally or illegally manufactured. *One Ford Coupe case, supra.* The effect of petitioners' contention is that since the automobiles in question were engaged in removing liquor at or just prior to their seizure, the offense was one of transportation under the National Prohibition Act rather than removal, deposit or concealment under Section 3450, and that therefore the defendants should have been prosecuted under the National Prohibition Act and the automobiles forfeited under Section 26. We submit that if the liquor in the automobiles had been tax-paid there would be some basis for this contention, as

there would then have been no violation of Section 3450. Consequently, Section 26 would have been the only law applicable and proceedings would have had to be brought thereunder. Section 3450 is not in direct conflict with Section 26 where distilled spirits are removed, deposited or concealed by means of an automobile with intent to defraud, even though transportation is involved in such transaction. The two sections cover different offenses and have different purposes. Section 3450 strikes at the removal, deposit and concealment of a particular kind or class of liquor, namely, tax-unpaid distilled spirits where there is an intent to defraud the Government of the tax. Two elements are necessary to be established to prove a violation of this section which are not necessary to be established under Section 26, namely, (a) the removal, deposit or concealment of tax-unpaid distilled spirits and (b) an intent to defraud the Government. Section 26 applies to the illegal possession and transportation of all intoxicating liquor, whether tax-paid or tax-unpaid, but it does not cover the element of intent to defraud which is denounced by Section 3450. Intent to defraud is an offense separate and distinct from any offense denounced by Section 26. Other distinguishing features showing the different purpose and scope of the two sections are enumerated in the *One Ford Coupe case* (pp. 330–331):

> The two statutes cover different ground. Different purposes underlay their enactment. Section 3450, extending to every taxed article, seeks to enforce the obligation to pay the tax by subjecting to forfeiture also articles used in the attempt to evade such payment. The purpose of Section 26 is to prevent the manufacture, sale or transportation of intoxicating liquor. *Carroll* v. *United States,* 267 U. S. 132, 154–155, 157. It is true that many acts punishable under Section 3450 are punishable also under Section 26. But many are not. Thus Section 3450 applies to a vehicle, whether used for removal, deposit or concealment, and even although the vehicle is not in motion and movement was never contemplated; Section 26 applies only to a vehicle used in transporting contrary to law. Section 3450 may apply although a permit was obtained to transport the liquor; Section 26 cannot. On the other hand Section 3450, as applied to liquor, relates only to that on which taxes have not been paid; Section 26 applies whether taxes have been paid or not. *It is clear that the mere existence of two provisions penalizing acts which are part of the same transaction does not prove direct conflict between them.* Nor does the difference in purpose which underlay their enactment. (Italics ours.)

In the *Ford Coupe case, supra,* there was advanced almost every conceivable argument why Section 3450 should not be applied to the facts in that

case. The Court answered all these arguments fully and completely, saying (p. 331):

> To establish an implied repeal there must, under the legislative mandate, be shown some necessary contradiction so extreme as to justify this Court in finding it impossible to permit the Government the choice between the two remedies where the facts bring the offense within the provisions of both statutes.

Also, with respect to the remedies afforded by Sections 3450 and 26 (p. 332):

> It is clearly possible to apply to a particular state of facts either one or the other remedy, and to give the Government the choice.

The fact that the automobiles in which the liquor was removed, deposited and concealed were in motion and engaged in transportation at or about the time of seizure has, we submit, no significant bearing upon the question of violation of Section 3450. Where an automobile is in motion, the element of removal is combined with the elements of deposit and concealment. Where the automobile is not in motion, the elements of deposit and concealment are sufficient to constitute violation of this section. In *Port Gardner Company* v. *United States,* 272 U. S. 564, and *Commercial Credit Co.* v. *United States,* 276 U. S. 226, the automobiles were in motion, and transported or contained liquor incidental to transportation at the time of seizure. This Court held that the cars could not be forfeited un-

der Section 3450. But it seems that the Court did not so hold because of a direct conflict between Sections 3450 and 26, but because those in charge of the cars had been prosecuted and convicted under the National Prohibition Act. In the *Commercial Credit Company case* the Court, with respect to its decision in the *Port Gardner case,* said (p. 231):

> In answering one of the questions presented by the certificate we held that the "prosecution with effect" of the driver of a car under the National Prohibition Act constituted "an election by the Government to proceed under Section 26 of that Act," and thereby prevented the forfeiture of the car under Section 3450. As to this we said: "The disposition of the automobile prescribed in Section 26 became mandatory after" the driver's "conviction; and being inconsistent with the disposition under Section 3450 necessarily precluded resort to proceedings under the latter section."

In other words, the Court held that the Government can not proceed against the defendant under one statute and against the vehicle under another, and that where there is a conviction of the driver under the National Prohibition Act, Section 26 makes it mandatory upon the Government to proceed against the car under the same Act. According to these decisions, it is conviction of those in charge of the vehicles, not the common element of transportation involved in the two offenses, which prevents election. The cases seem to recognize that

the Government has the right of election, except where there has been a conviction. This situation does not obtain in the present cases. While there were arrests and seizures under the Prohibition Act, there was no prosecution or conviction. See *United States* v. *Commercial Credit Co.* (C. C. A. 4th), 20 F. (2d) 519, 520. There was no attempt here by the District Attorney to proceed criminally under one statute and to seek a forfeiture under another. Both the criminal and forfeiture proceedings were instituted under the revenue laws. It would seem that in a case like those at bar, where are present all the elements of violation of Sections 3296 and 3450, namely, removal, deposit and concealment of tax-unpaid distilled spirits with intent to defraud, the mere fact that the element of removal is of such a character that it could be called transportation should not deprive the Government of the right to enforce its laws as declared in those sections. Under petitioners' theory, if the Government apprehends persons in the act of removing and concealing tax-unpaid distilled spirits by means of an automobile with intent to defraud, then the mere fact that the instrumentality of removal and concealment was in motion at the time it was apprehended would force the Government to abandon the enforcement of the revenue laws, and to proceed against the persons and the car under the National Prohibition Act or let them go free. Thus, a certain law of the United States describing

one offense, and which this Court has said is in force and effect, could not be enforced when there is another law describing a different offense and which is also in effect, merely because one of the elements of the latter law, namely, transportation—which, under petitioners' theory, must not be called removal—appears among the several elements constituting a violation of the former law. It is not believed that Congress could have had any such intention. The element of removal could be entirely eliminated and there would still be left the elements of deposit and concealment which would be sufficient to convict and to forfeit the vehicle. It does not, therefore, seem reasonable to say that because this element is present in a case there can be no complete forfeiture of the car under Section 3450 because, as petitioners, in effect, contend, removal is in fact not removal under that section, but is transportation under Section 26.

Petitioners rely strongly on the fact that the language of Section 26 is mandatory, in that it says that the officer *shall* take possession of the vehicle and proceed against it as therein provided. We submit that the language of Section 26 should be construed in the light of the facts in each case. Manifestly, if there is a violation of Section 26 and of no other law, the Prohibition Act would exclusively apply and the automobile would have to be disposed of as therein provided. But it is pressing the point too far to say that in every case of

possession and transportation Congress intended that other applicable laws of the United States should be suspended and become inoperative.

In *Railroad Company* v. *Hecht*, 95 U. S. 168, it was said that as against the Government the word "shall" is to be construed as "may," unless a contrary intention is manifested. In law "shall" or "may" are often convertible terms. *West Wisconsin Railway Co.* v. *Foley*, 94 U. S. 100, 103. In *Boyer* v. *Onion*, 108 Ill. App. 612, it was pointed out that the intention of the statute under consideration controls and that when the spirit and purpose of the Act require the word "shall" to be construed as merely giving permission it will be so construed. In *Fields* v. *United States*, 27 App. D. C. 433, 440. it is said:

> Words like may, must, shall, and so forth, are constantly used in statutes without intending that they shall be taken literally, and in their construction the object evidently designed to be reached limits and controls the literal import of the terms and phrases employed.

In *Fleischmann Co.* v. *United States*, 270 U. S. 349, it is said (p. 360):

> The strict letter of an act must, however, yield to its evident spirit and purpose, when this is necessary to give effect to the intent of Congress. * * * And unjust or absurd consequences are, if possible, to be avoided.

See also *Holy Trinity Church* v. *United States*, 143 U. S. 457; *United States* v. *Kirby*, 7 Wall. 482, 486; *United States* v. *Katz*, 271 U. S. 354, 357.

It will be noted that the language of Section 3450 is no less mandatory than the language of Section 26 with reference to the disposition of vehicles. It provides that all vehicles and other things "used in the removal or for the deposit or concealment thereof, respectively, *shall be forfeited.*"

The construction of Section 26 as compulsory and exclusive in all cases where transportation is involved will produce consequences which could hardly have been intended. For example, if the driver of a vehicle used to transport liquor escapes, or if witnesses die or fail to identify him, no forfeiture of the car can be had, because under Section 26 the individual must first be convicted. Section 3450 or any other statute under which the vehicle might be forfeited can not be invoked. If a vehicle is used to conceal liquor on which the tax is unpaid, complete forfeiture may be had; but if to the offense of tax evasion is added the offense of transportation without a permit, a less severe forfeiture results. Where a vehicle is used to smuggle intoxicating liquor, and is seized while transporting such liquor across an international border, it may be forfeited only under Section 26, although the offense of smuggling, entailing a complete forfeiture under Sections 3061 and 3062, Revised Statutes (U. S. C., Title 19, Secs. 481–483), has been simultaneously committed. Again, if a vehicle car-

ries both liquor and smuggled merchandise, it is used in transporting liquor in violation of the National Prohibition Act and in smuggling merchandise, and yet Section 26 must be resorted to rather than the statutes incurring a greater forfeiture. So, a vehicle seized while being used in smuggling narcotics or diamonds may be completely forfeited, but if used in smuggling liquor so that transportation results, innocent interests must be protected. In short, where a vehicle or vessel is used in the illegal transportation of liquor, the Government is precluded from securing a forfeiture not only under Section 3450 for tax evasion, but under any other statute imposing a forfeiture for some other simultaneous offense, such as under the customs or navigation laws, where the interests of innocent owners are not saved. If a vessel proceeds on a foreign voyage without giving up her enrollment and license and being duly registered she is subject to complete forfeiture under Section 4337, Revised Statutes (U. S. C., Title 46, Sec. 278), but if she is discovered proceeding with a cargo of liquor so that transportation results innocent interests must be saved. So, a vessel employed in a trade other than that for which she is licensed is subject to complete forfeiture under the navigation laws (Sec. 4377, R. S., U. S. C., Title 46, Sec. 325), but if, while so employed, she is apprehended transporting liquor forfeiture can be had only under Section 26. The same result would flow from Sec-

tions 585 and 586 of the Tariff Act of 1922, c. 356, 42 Stat. 858, 980 (U. S. C., Title 19, Secs. 487, 488), dealing with the improper entry and departure and the unlawful lading of vessels. Other illustrations might be given to show consequences which Congress could not have intended, but which would follow from reading the word "shall" as used in Section 26 to require that forfeiture proceedings must be had thereunder, if at all, where illegal transportation occurs. It does not seem necessary to give Section 26 that interpretation.

Some of these statutes have been in force and effect many years. While originally enacted for a different purpose, they may be effectively employed in the suppression of the liquor traffic, and it is not believed that Congress intended by the adoption of Section 26 to deprive the Government of their full penalty provisions. On the contrary, Section 5 of the Willis-Campbell Act and Section 35 of the National Prohibition Act (U. S. C., Title 27, Sec. 52) would indicate that Congress intended that these statutes should continue in force, if they had been repealed, and be construed as supplementing the National Prohibition Act so as to afford the Government an additional remedy in prohibition enforcement matters.

If Section 26 is not construed as compulsory and therefore exclusive, the argument that a conflict exists loses its force. One statute providing that the United States *may* forfeit guilty interests in a

vehicle for its use in violation of the National Prohibition Act, and another statute that the United States may forfeit all interests in the vehicle, if used to evade the revenue, customs or navigation laws are not in conflict. See *Distilled Spirits*, 11 Wall. 356, 365; *United States* v. *Turner*, 266 Fed. 248; *United States* v. *One Ford Automobile*, 292 Fed. 207, 210; *United States* v. *One Bay State Roadster*, 2 F. (2d) 616, 622; *United States* v. *One Ford Coupe*, 3 F. (2d) 64, 66.

II

THE UNITED STATES ATTORNEY SHOULD HAVE THE RIGHT OF ELECTION AS TO THE STATUTE UNDER WHICH HE WILL PROCEED, WITHOUT REGARD TO THE ACTION OF ARRESTING OFFICERS

If by reason of the language used, proceedings under Section 26 are held to be mandatory and exclusive in all transportation cases, there is of course no election, but if there is a right of election, it should rest with the United States Attorney, as held by the courts below, and he should not be bound by the action of the arresting officers.

Notwithstanding that Section 26 provides that the arresting officer shall proceed thereunder against the offender and the vehicle, it would seem that this provision should be construed with relation to the duties generally of the United States Attorney. It is his duty to enforce all the criminal laws (Section 771, R. S.; U. S. C., Title 28, Sec. 485), and where there are two criminal statutes

apparently violated at the same time or by substantially the same Act, he must determine whether he will prosecute under either or both, and that determination must be based largely on his judgment as to the probable results of the prosecution. As said in *United States* v. *Commercial Credit Co.* (C. C. A., 4th), 20 F. (2d) 519, 521, the United States Attorney is the law officer authorized to speak in behalf of the Government. It would greatly hamper him in the performance of his duties to be bound by the conclusions of prohibition agents and United States commissioners. Regardless of the seizures made and warrants issued, he must determine from the facts before him what he can prove before a court and jury, and his action should be in accordance with that determination. A seizure may be made and a warrant issued under the National Prohibition Act. It may develop that the parties charged are not guilty under that Act, but are guilty under some other law incurring a forfeiture. If the United States Attorney is bound by the action taken he is precluded from proceeding with a proper prosecution, and the guilty parties will escape because of the mistakes of the arresting officer and the commissioner. Again, an act may constitute a violation of both the revenue laws and the National Prohibition Act and an arrest and seizure may be made under the latter law. Because of the escape or death of the guilty party a conviction can not be obtained, yet the United States Attorney can not proceed with the forfeiture under

the revenue laws because the arrest and seizure were made under the National Prohibition Act. In answer to questions arising under such illustrations, the Circuit Court of Appeals for the Fourth Circuit said in *United States* v. *Commercial Credit Co., supra* (p. 521):

> To ask these questions is to answer them; and to our minds they demonstrate the unsoundness of the suggestion that, by action of a prohibition agent or a United States commissioner, the government is to be held to have made an election of remedies, and is to be precluded from prosecuting crimes denounced by its laws or forfeitures incurred thereunder. The fact that the statute directs that, upon an arrest and seizure under the Prohibition Act, the officer of the law shall proceed against the person arrested, in a court of competent jurisdiction, manifestly was not intended to preclude a prosecution for other crimes of which the person arrested might be guilty, or to make such action by the officer an election by the government to proceed under the Prohibition Act instead of under the internal revenue laws, if the act of which accused was guilty constituted a violation of both.

Experience may demonstrate to the United States Attorney that a conviction could not be obtained on the evidence presented to him by a prohibition agent or other arresting officer. If the United States Attorney may otherwise properly proceed under either Section 26 or Section 3450, we submit

that the mere fact that Section 26 provides that the arresting officer "shall at once proceed against the person arrested under the provisions of this title" does not make it the duty of the United States Attorney to proceed under Section 26 exclusively. The matter can proceed only through the United States Attorney and when the arresting officer has brought the facts to that officer the latter must determine the course that shall thereafter be pursued.

The facts in the cases at bar disclosed a violation of the internal revenue laws providing for a fine, penalty and forfeiture. In this connection Section 838, Revised Statutes (U. S. C., Title 28, Sec. 486), provides:

> It shall be the duty of every district attorney to whom any collector of customs, or of internal revenue, shall report, according to law, any case in which any fine, penalty, or forfeiture has been incurred in the district of such attorney for the violation of any law of the United States relating to the revenue, to cause the proper proceedings to be commenced and prosecuted without delay, for the fines, penalties, and forfeitures in such case provided, unless, upon inquiry and examination, he shall decide that such proceedings can not probably be sustained, or that the ends of public justice do not require that such proceedings shall be instituted; in which case he shall report the facts in customs cases to the Secretary of the

Treasury, and in internal revenue cases to the Commissioner of Internal Revenue for their direction.

It was as much the duty of the United States Attorneys when these cases were reported to them to proceed under this law as under the National Prohibition Act. They had to determine the proper course to be pursued. See *Confiscation Cases,* 7 Wall. 454, 457; *The Jugoslavia,* 21 F. (2d) 99, 101; *United States* v. *Woody,* 2 F. (2d) 262.

It is settled that the United States Attorney has no right of election as to the disposition of the vehicle after there has been a conviction for transportation or for possession incidental to transportation. At what stage of the proceedings short of conviction he may elect under which statute he will proceed has not been definitely decided. In the *Port Gardner case, supra,* this Court found it unnecessary to determine whether the mere commencement of a proceeding under Section 26 constitutes an election, but a prosecution resulting in a plea of guilty was construed as a "prosecution with effect" and as resulting in an election. In *Commercial Credit Corporation* v. *United States* (C. C. A., 2d), 18 F. (2d) 927, it was held that the filing of an information constituted an election. Under Section 26 it is the conviction of the person arrested that determines the disposition of the vehicle. Likewise, Section 5 of the Willis-Campbell Act takes no account of the mere commencement of a

proceeding, but provides that, as to offenses which constitute a violation of the liquor laws in force before the National Prohibition Act as well as of that Act or the Willis-Campbell Act, only a conviction under one statute shall bar a prosecution under the other.

CONCLUSION

It is respectfully submitted that the proceedings had in these cases were proper, that the cases were correctly decided, and that the judgments and decrees of the courts below should be affirmed.

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APRIL, 1930.

APPENDIX

For the convenience of the Court the following statutes are set forth below:

Section 26, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 315 (U. S. C., Title 27, Sec. 40):

> When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or aircraft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to re-

turn said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or aircraft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of

seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

Sec. 35, p. 317 (U. S. C., Title 27, Sec. 52):

All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

* * * * *

Section 5 of the Supplemental Act of November 23, 1921, c. 134, 42 Stat. 222, 223 (U. S. C., Title 27, Sec. 3):

> That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. * * *

Sec. 771, Revised Statutes (U. S. C., Title 28, Sec. 485):

> It shall be the duty of every district attorney to prosecute, in his district, all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States are concerned, and, unless otherwise instructed by the Secretary of the Treasury, to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors, or other officers of the revenue, for any act done by them or for the recovery of any money exacted by or paid to such officers, and by them paid into the Treasury.

Section 3450, Revised Statutes (U. S. C., Title 26, Sec. 1181):

> Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited. And every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than five hundred dollars. And all boilers, stills, or other vessels, tools and implements, used in distilling or rectifying, and forfeited under any of the provisions of this Title, and all condemned material, together with any en-

gine or other machinery connected therewith, and all empty barrels, and all grain or other material suitable for distillation, shall, under the direction of the court in which the forfeiture is recovered, be sold at public auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of according to law. And all spirits or spirituous liquors which may be forfeited under the provisions of this Title, unless herein otherwise provided, shall be disposed of by the Commissioner of Internal Revenue as the Secretary of the Treasury may direct.

U. S. GOVERNMENT PRINTING OFFICE: 1946

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 569

DAVIES MOTORS, INC., PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 13, 1930

CERTIORARI GRANTED FEBRUARY 24, 1930

(34,700)

(34,700)

SUPREME COURT OF THE UNITED STATES

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Names and Addresses of Attorneys.

For Appellant:

YOUNG & YOUNG, Esqs., Pacific Mutual Building, Los Angeles, California.

For Appellee:

SAMUEL W. McNABB, Esq., United States Attorney.

HARRY GRAHAM BALTER, Esq., Assistant United States Attorney, Federal Building, Los Angeles, California.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

UNITED STATES OF AMERICA, Libelant, vs. ONE WILLYS-KNIGHT ROADSTER AUTOMOBILE, Engine #27-260, Respondent, and DAVIES MOTORS, Inc., a corporation, Intervener.	)	No. 466-H CITATION ON APPEAL

To the United States of America, Libelant herein, and to Samuel W. McNabb, United States Attorney and Harry Graham Balter, Deputy United States Attorney, its attorneys:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco in the State of California, on the 26th day of July, A. D. 1929, pursuant to Order allowing appeal filed in the Clerk's office for the District Court of the United States in and for the Southern District of California, in that certain cause wherein you are defendant in error and the Davies Motors, Inc. is plaintiff in error, and you are hereby requested to

show cause, if any there be, why the decree rendered in the above entitled case confiscating and forfeiting to the United States Government and why the decree entered in the said Order allowing appeal should not be corrected and reversed and speedy justice done to the Intervener in that behalf.

WITNESSETH, the Honorable William P. James, United States District Judge for the Southern District of California, this 28 day of June, A. D., 1929, and of the Independence of the United States, 153.

Wm. P. James

United States District Judge For the Southern District of California.

[Endorsed]: Received copy of the within Citation on Appeal this 28th day of June 1929 Ignatius F. Parker Asst. U. S. Attorney Attorney for Libelant Filed Jun. 28, 1929. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

LIBEL

The United States of America, by SAMUEL W. McNABB, United States Attorney for the Southern District of California, and Harry Graham Balter Assistant United States Attorney for said District, respectfully shows:

COUNT I.

Paragraph 1.

That on or about the 27th day of September, 1928, at Fresno, County of Fresno and within the Northern Division of the Southern District of California, and

within the jurisdiction of the United States and this Honorable Court, PAUL L. MATHIAS, duly authorized, appointed and acting agent of the COMMISSIONER OF PROHIBITION of the United States, seized a certain WILLYS-KNIGHT ROADSTER AUTOMOBILE, engine number 27-260, in which said automobile there was then and prior thereto, concealed and deposited by HANS P. MORTENSEN (alias H. P. BENDER) certain goods, merchandise and commodities, to-wit: Five (5) pints of distilled spirits, upon which there was then due certain taxes imposed by the Act of November 23, 1921, known as the Willis-Campbell Act and the Revenue Act of 1921.

Paragraph 2.

That the said automobile has been appraised, as provided by law, at the sum of Twelve Hundred Dollars ($1200.00).

Paragraph 3.

That the said taxes due and imposed, as aforesaid, had not been paid, and the said goods, merchandise and commodities were concealed and deposited in said automobile with the intent to defraud the United States of the said taxes.

Paragraph 4.

That the said deposit and concealment of the said goods and commodities in said automobile was and is a violation of the provisions of Section 3450 of the Revised Statutes of the United States and the said automobile is subject to condemnation, forfeiture and sale.

COUNT II.

For additional cause of condemnation and forfeiture of the above described automobile the United States of America, by SAMUEL W. McNABB, United States Attorney for the Southern District of California, and *Samuel W. McNabb* Assistant United States Attorney for said District, respectfully shows:

Paragraph 1.

That on or about the 27th day of September, 1928, at Fresno, County of Fresno and within the Northern Division of the Southern District of California, and within the jurisdiction of the United States and this Honorable Court, PAUL L. MATHIAS, duly authorized, appointed and acting agent of the COMMISSIONER OF PROHIBITION of the United States, seized a certain WILLYS-KNIGHT ROADSTER AUTOMOBILE, engine number 27-260, in which there was then and there possessed, deposited and concealed a certain quantity of distilled spirits, to-wit: Five (5) pints of whiskey, which said distilled spirits was merchandise unlawfully smuggled into the United States from a foreign country without the payment of duties and taxes imposed by Section 900 of the Revenue Act of 1926, and without securing a permit from the Commissioner of Prohibition or the Collector of Customs to enter and bring said merchandise into the United States.

Paragraph 2.

That the said ONE WILLYS-KNIGHT ROADSTER AUTOMOBILE, engine number 27-260, has been appraised, as provided by law, at the sum of Twelve Hundred Dollars ($1200.00).

Paragraph 3.

That the said duties due and imposed upon the said merchandise had not been paid and the said merchandise had been unlawfully smuggled and introduced into the United States by parties unknown, with the intent to evade the payment of said duties and to defraud the revenue of the United States.

Paragraph 4.

That the smuggling into the United States of the said merchandise without the payment of the duties due thereon and without securing a permit to enter and bring the said merchandise into the United States and to defraud the revenue of the United States have subjected the said automobile to condemnation, forfeiture and sale under the provisions of Sections 3061 and 3062 of the Revised Statutes.

PRAYER

WHEREFORE, the United States Attorney prays that the usual process issue against the said automobile, and that all persons interested in and concerned in the said automobile be cited to appear and show cause why such forfeiture should not be adjudged, and that all due proceedings being had therein, this Honorable Court may be pleased to condemn the said automobile as forfeited to the United States, and that a judgment condemning the said automobile may thereupon be made and entered, and that the said judgment may also order the same to be sold by the United States Marshal, as provided by law and that a Writ of Venditioni Exponas may issue directed to the Marshal for that purpose and for such other and

further judgment and order as to the Court may seem proper in the premises.

SAMUEL W. McNABB,
United States Attorney.
Harry Graham Balter
Assistant United States Atorney.

[Endorsed]: Filed Jan. 2, 1929. R. S. Zimmerman, Clerk. By M. L. Gaines, Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

COMPLAINT IN INTERVENTION.

Davies Motors, Inc., a corporation, by William K. Young, its attorney respectfully shows:

I.

That the intervener is a corporation organized and existing under and by virtue of the laws of the State of California and authorized to do business and doing business as a dealer in Willys-Knight automobiles in the City of San Diego, State of California.

II.

That on May 3rd, 1927 Mrs. H. P. Mortensen purchased from said corporation a Willys-Knight automobile under conditional contract of sale pursuant to which said corporation retained the title thereof until the purchase price should have been fully paid. That at the time of said sale said corporation, in accordance with its custom, required and secured a credit statement from said purchaser in which said purchaser alleged that H. P. Mortensen, her husband, was engaged in the interior decorating business on his own account and had been so engaged for a period of eight years. As assets said purchaser listed a house and

lot in Omaha, Nebraska of the then value of Eight Thousand Dollars ($8,000.00) and also gave two references, both of which said corporation investigated and found satisfactory. That said purchaser made the payments on said car regularly and on the due date and on June 22, 1928, at the solicitation of one of said corporation's salesman, said purchaser traded in the Willys-Knight purchased on May 3, 1927 and purchased the Willys-Knight roadster, engine #27-260, referred to above, on conditional sales contract under and pursuant to the terms of which said corporation retained the title thereto until all payments should have been completed; a copy of said contract is attached hereto and made a part hereof as though specifically set forth at this place and marked Exhibit "A".

III.

That the sale price of the Willys-Knight roadster purchased on June 22, 1928 was Thirteen Hundred ninety-five Dollars ($1395.00) and the unpaid balance after allowing credit for the equity in the car applied as down payment was Eight Hundred ninety-six Dollars ($896.00) plus insurance and financing charge; that the contract of sale attached hereto as Exhibit "A" required said purchaser to pay the sum of Fifty-seven Dollars ($57.00) per month, commencing with July 22, 1928.

IV.

That on July 22, 1928 said payment of Fifty-seven Dollars ($57.00) then due was not made and said corporation sent a collector to the purchaser's resident and he ascertained that purchaser and her husband had moved to Fresno, thereupon demand was made

upon the purchaser and part of said Fifty-seven Dollars ($57.00) payment was made on August 6th and the balance thereof on August 7, 1928.

V.

That said corporation had no notice either actual or constructive that said automobile was being used for illegal purposes either as charged in said libel or otherwise and knew of no facts or circumstances which would reasonably or otherwise lead it to believe that said auotmobile was being so used; that on the contrary due to the experience which said corporation had had with said purchaser since the date of the first sale, to-wit: on May 3rd, 1927, said corporation and its officers and agents thereof have every reason to believe and did believe that said car was being used legally and that the purchaser and her husband were reliable, law-abiding citizens and responsible people to be accepted as purchasers of said automobile.

VI.

That the Davies Motors, Inc. is now and at all times herein mentioned has been the legal owner of said Willys-Knight roadster automobile; that no payments have been made under and pursuant to the terms of the aforesaid conditional sales contract attached hereto as Exhibit "A" since the said 7th day of August, 1928 and said Davies Motors, Inc. is, under and pursuant to the terms thereof, entitled to the immediate and exclusive possession of said automobile and to all legal and equitable rights therein as the exclusive owner thereof.

VII.

That on or about the 27th day of September, 1928, in the City of Fresno, County of Fresno, State of

California, one Paul L. Mathias, a duly authorized, appointed and acting agent of the Commissioner of Prohibition of the United States of America, seized, arrested and took into custody Hans P. Mortensen, heretofore referred to as H. P. Mortensen, for the alleged unlawful possession and transportation of 12 one pint bottles of intoxicating liquor, in violation of the Act of October 28, 1919 and at the same time and place of said arrest transporting five pints of intoxicating liquor then and there containing more than ½ of 1% of alcohol by volume, in violation of the act of October 28, 1919, and ever since said time said automobile has been, and now is, held by and in the possession and custody of the Commissioner of Prohibition of the United States of America.

VIII.

Intervener is informed and believes, and therefore alleges, that at the time of said arrest and confiscation the said Hans P. Mortensen was transporting in said Willys-Knight automobile five pint bottles of intoxicating liquor fit for beverage purposes then and there containing more than ½ of 1% of alcohol by volume contrary to the act of October 28, 1919.

IX.

That thereafter and on the 3rd day of October, 1928 said Paul L. Mathias swore to a complaint before Samuel F. Hollins, a United States Commissioner, duly appointed by the District Court of the United States of America for the Southern District of California, charging the said Hans P. Mortensen with the unlawful possession and transportation of 12 one pint bottles of intoxicating liquor in the County of Fresno,

State of California, on the 27th day of September, 1928, in violation of the Act of October 28, 1919.

X.

That pursuant to said affidavit of complaint and on the said 3rd day of October, 1928 said Samuel F. Hollins, United States Commissioner, issued a warrant for the apprehension of said Hans P. Mortensen, and said Hans P. Mortensen was taken into the custody of the United States Marshal in and for the Southern District of California and was by said Marshal deprived of his liberty and detained as a prisioner for the violation of said Act of October 28, 1919, to-wit: Possession and transportation of intoxicating liquor fit for beverage purposes.

XI.

That a copy of said affidavit of complaint and a copy of said warrant is each attached hereto and made a part hereof by reference as though specifically set forth at this place and marked Exhibit "B" and Exhibit "C", respectively.

XII.

That said Davies Motors, Inc. is entitled to the delivery of said automobile to it by the said Commissioner of Prohibition or by any person now in possession or control thereof.

WHEREFORE, Davies Motors, Inc. pray judgment herein that the libelant take nothing by this action and that said automobile be ordered delivered to this intervener and for other and further relief as to the court may seem proper.

YOUNG & YOUNG,
By De Forrest Home
Attorneys for the Intervener.

STATE OF CALIFORNIA,)
) ss.
COUNTY OF LOS ANGELES.)

William K. Young being by me first duly sworn, deposes and says: That he is the attorney for the Davies Motors, Inc., Intervener herein, and makes this affidavit in its behalf for the reason that none of its officers reside within the County of Los Angeles; that he has read the foregoing Complaint in Intervention and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

William K. Young

SUBSCRIBED and sworn to before me this 22nd day of January, 1929

[Seal] B. Newbill

Notary Public in and for the County of Los Angeles, State of California.

Original.

AGREEMENT.

DAVIES MOTORS, INC., hereinafter called "Owner", hereby agrees to sell to MRS. H. P. MORTENSEN hereinafter called "Purchaser", who hereby agrees to buy, that certain WILLYS KNIGHT Automobile Type 66 Road, Car No. .....Motor No. 27260 License No. 1758011, together with such attachments, accessories, parts and equipment as are now upon and delivered with the same, for the total purchase price of FIFTEEN HUNDRED THIRTY NINE 48/100 ($1539.48) Dollars, U. S. Gold Coin, of present standard weight and fineness, payable at owner's place of business in San

Diego, California, as follows: FOUR HUNDRED NINETY EIGHT 40/100 ($498.40) Dollars in cash at date hereof, and the balance of TEN HUNDRED FORTY ONE 08/100 ($1041.08) Dollars, payable as follows: $57.00 on 22nd each month for 17 months start July 22, 1928 $72.08 on 22nd of 18th mo. together with interest from maturity on all sums remaining unpaid, at the rate of eight per cent. per annum, payable monthly at the office of the owner, or assignees, upon the following terms and conditions:

(1) Time is of the essence of this contract, and acceptance by said owner of any payment after same is due shall not constitute a waiver by owner of this provision.

(2) The title to said automobile, and parts added thereto, shall remain in owner until purchaser's complete performance of all the provisions of this agreement.

(3) If said purchaser defaults in any of the above payments, when due, or defaults in any provision of this contract, or if said automobile is attached or levied upon under any writ or process of any court, or if said purchaser is declared a bankrupt, said owner may, at his option, without previous demand or notice, (First) Retake possession of said automobile and all its new and old equipment and accessories, with or without process of law; and all payments theretofore paid hereunder shall thereupon be forfeited to said owner for the use, wear, tear and depreciation of said automobile, and this contract shall thereupon terminate and all rights of purchaser in this contract and said automobile shall thereupon cease, and are hereby waived; or (Second) said owner

may declare the whole of the sums then remaining unpaid to be immediately due and payable, and sue therefor; or he may take possession of said automobile and accessories and sell the same, without notice to purchaser, either at public or private sale, and apply the proceeds of said sale upon the whole amount due, together with interest, costs and attorney's fees as herein provided, and should the proceeds of said sale be insufficient to pay the amount so remaining unpaid as aforesaid, together with interest, costs, attorney's fees and costs of sale, the undersigned purchaser agrees to pay the owner, successor or assigns, the balance so remaining unpaid. In case suit is brought or other proceeding taken to recover said property, or any part thereof or all or any part of the amount due under this agreement, said purchaser agrees to pay all costs and 10% of the purchase price of said automobile as attorney's fees to said owner.

(4) The loss or destruction or theft of, or damage to, said automobile, from any cause, are at purchaser's rick, and shall not relieve the purchaser from his obligation to make all payments herein specified.

(5) Said purchaser agrees, during the life of this contract, to exhibit said automobile to said owner upon demand, and to keep said property in good order and repair to the satisfaction of owner and promptly pay all taxes levied or assessed thereon, and keep the same insured in owner's or his assignee's name, in a sum not less than the unpaid balance, against fire, theft, and unlawful conversion, in companies satisfactory to owner, and all policies to be retained by owner. If said purchaser does not pay said taxes when due, or keep said automobile insured or in good

repair as aforesaid or pay any lien for any reason existing on said property, the owner may do so and pay therefor and add same to the next installment of the purchase price due hereunder, and said purchaser agrees to repay the amount or cost thereof, with such payment; said owner may take possession of said automobile for the purpose of putting same in repair as aforesaid, but the taking possession thereof for such purpose shall not operate as an election by owner to terminate this contract.

EXHIBIT "A"—Page 1

(6) All bills for repairs done upon and material furnished for said automobile by said owner during the *left* of this agreement, shall be added to the purchase price of said automobile, and be payable to said owner, on the tenth day of the next succeeding month, and purchaser acquires no right or title in or to said personal property until all such bills have been paid by him.

(7) Said purchaser agrees that he will not, and has no right to, assign, pledge, mortgage, or otherwise dispose of this contract, or said automobile or any part thereof, or use or permit said automobile to be used, for rental purposes, or remove the same from the county of San Diego, State of California, or incur any bills, other than with owner, for repairs to said automobile in excess of $10.00, during the existence of this agreement, without the written consent of said owner.

(8) Purchaser agrees to pay all taxes and revenue charges of every nature whatsoever levied or assessed, or to be levied or assessed against said automobile, or against the debt evidenced by this agreement.

(9) Said purchaser agrees to save said owner harmless from any and all liability, including all costs and attorney's fees, for all injury or damage to persons or property caused in any manner by the use of said automobile during the *left* of this agreement.

(10) Upon the full, complete and strict compliance by said purchaser with all the provisions hereof and payment of all moneys due on this contract, at the times and in the manner herein set out (and not otherwise) title to said automobile shall pass to said purchaser and the said owner agrees to thereupon execute a bill of sale of said automobile to said purchaser.

(11) It is agreed that said automobile is now in good repair and condition, and that this instrument contains the entire agreement between the parties and shall not be binding upon owner unless signed by an official of the company.

(12) This agreement shall inure to the benefit of and be binding upon the heirs, executors, administrators and successors of the respective parties hereto, and the assigns of said owner.

(13) The assignment of this contract by the owner shall operate to transfer the title to said property and all of the rights of the owner hereunder to said assignee without notice of said assignment to the purchaser.

(14) It is distinctly understood and agreed that during the term of this contract, the automobile herein agreed to be sold shall not be used for the transportation of intoxicating liquors, drugs or narcotics, and shall not be used in or about the violation of any United States, state or municipal statute law or ordi-

nance. Any violation of this provision shall forthwith terminate this contract and any and all rights of the purchaser in or to said automobile and the possession thereof, and without notice or demand of any character, the owner shall take immediate possession of said automobile and all accessories, using all necessary force so to do, and any and all rights of the purchaser in or to said automobile or the possession thereof shall thereupon be immediately forfeited and the owner shall be and become the sole owner of the same and each and every part thereof and right and interest therein and shall be alone and solely entitled to the possession thereof, and all payment previously made by the purchaser shall be retained for depreciation in value and for the use of said automobile, and the purchaser hereby waives all rights to the moneys so paid and all rights against the owner for taking possession of said automobile.

(15) The waiver by the owner of any breach of any covenant or agreement herein contained on the part of the purchaser shall not be deemed or held to be a waiver of any subsequent or other breach of said covenant or agreement nor a waiver of any other covenant or agreement herein contained.

Executed in Triplicate, this 22nd day of June, 1928, at San Diego, California.

DAVIES MOTORS, INC., Owner.

By .....

Owner.

.....

Purchaser.

Address: Town San Diego, State Calif.
No. 3820 Louisiana Street.

EXHIBIT A—Page 2.

AFFIDAVIT OF COMPLAINT.

U. S. Rev. Stat.

United States of America;
Southern District of California, } ss.

BE IT REMEMBERED, That on this 3rd day of Oct. in the year of our Lord one thousand nine hundred and 28, before me, DAVID B. HEAD, United States Commissioner duly appointed by the District Court of the United States of America for the Southern District of California, to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes depending in the Courts of the United States, etc., pursuant to the Acts of Congress in that behalf, personally appeared

PAUL L. MATHIAS, Fed. Agt.

who being duly sworn, according to law, deposes and says that

HANS P. MORTENSEN, alias H. P. Bender,

heretofore to-wit on or about the 27th day of Sept. in the year of our Lord one thousand nine hundred and 28 and within the jurisdiction of the United States aforesaid and of this Honorable Court Did willfully, wrongfully, and unlawfully possess and transport 12 one pint bottles of intoxicating liquor in the County of Fresno, State of California, in violation of Act of Oct. 28, 1919 contrary to the form of the Statutes of the United States in such case made and provided, and against the peace and dignity of the said United States.

SUBSCRIBED AND SWORN TO before me this 3rd day of Oct. 1929.

Paul L. Mathias
SAMUEL F. HOLLINS
United States Commissioner.

I hereby certify that the above is a true and correct copy of the original.

[SEAL] Samuel F. Hollins.

EXHIBIT "B."

UNITED STATES OF AMERICA.
SOUTHERN DISTRICT OF CALIFORNIA, ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Marshal of the United States for the Southern District of California, and to his Deputies, or any or either of them, Greetings:

WHEREAS, complaint on oath has been made to me charging that HANS P. MORTENSEN, alias H. P. Bender on or about the 27th day of Sept. in the year of our Lord one thousand nine hundred and 28 and within the jurisdiction of the United States, and within the jurisdiction of the Honorable the District Court of the United States, in for the Southern District of California, Did willfully, wrongfully and unlawfully possess and transport 12 one pint bottles of intoxicating liquor in the County of Fresno, State of California, in violation of the Act of Oct. 28, 1919

NOW, THEREFORE, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said HANS P. MORTENSEN, alias H. P. Bender and bring his body forth-

with before me, a United States Commissioner appointed by the District Court of the United States, for the Southern District of California, at my office, in the City of Los Angeles, that he may then and there be dealt with according to law for the said offense.

GIVEN UNDER MY HAND AND SEAL, this 3rd day of Oct. in the year of our Lord, one thousand nine hundred and 28 and of our independence the one hundred and fifty second

[SEAL] SAMUEL F. HOLLINS
U. S. Commissioner for said District.

EXHIBIT "C."

In obedience to the within warrant, I have the body of HANS P. MORTENSEN before DAVID B. HEAD, U. S. Commissioner, this 5th day of Oct. 1928.

A. C. SITTEL
U. S. Marshal.
By S. J. Shannon
Deputy.

In jail Fresno Oct 4/28 at 3:30 P. M.

[Endorsed]: Received copy of the within this 22nd day of Jan. 1927. E. E. Doherty. Filed Jan 22, 1929. R. S. Zimmerman, Clerk, by M. L. Gaines, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

STIPULATION OF FACTS

IT IS HEREBY STIPULATED by and between counsel, United States of America, Libelant, and

Daview Motors, Inc., a corporation, Intervenor and Claimant, that the facts in this case are as follows:

I.

That on or about the 27th day of September, 1928, and at all times hereinafter mentioned in this Stipulation of Facts, Paul L. Mathias was and is a duly authorized and Acting Agent of the Commissioner of Prohibition of the United States;

II.

That on or about the 27th day of September, 1928, in the City of Fresno, County of Fresno, and within the Northern Division of the Southern District of California, the said Paul L. Mathias, acting on behalf of and for the said Commissioner of Prohibition of the United States, seized a certain Willys-Knight Roadster automobile, Engine No. 27-260, being the same automobile as is the respondent in the above named libel;

III.

That at the time the said respondent automobile was seized, as aforesaid, there was concealed and deposited therein, certain goods, merchandise and commodities, to-wit: Five (5) Pints of distilled spirits; that the said distilled spirits were fit for beverage purposes and then and there contained more than one-half of one per cent of alcohol by volume; that there was due upon the said Five (5) Pints of distilled spirits, certain taxes imposed by the Act of November 23, 1921, known as the Willis-Campbell Act, and by the Revenue Act of 1921; that at the time when the said distilled spirits were concealed and deposited in the said automobile, as aforesaid, the taxes due

thereon were unpaid and still remain unpaid; that there were no marks, stamps or labels on the said bottles of said distilled spirits to indicate that said taxes due thereon had been paid;

IV.

That the facts of the seizure are as follows: That on the evening of September 27, 1928, Agent Paul L. Mathias stationed himself in the rear of the Sequoia Hotel, in the City of Fresno, State of California, and there saw one Hans P. Mortensen, alias H. P. Bender, in the act of removing Five (5) Pints of Mexican Smuggled whiskey, bearing the label "Border Bell Bourbon Whiskey, etc.", from the said respondent automobile; that the said Mortensen had deposited and concealed the said smuggled whiskey in the respondent automobile with the intent to defraud the United States Government of the taxes due thereon; in violation of the provisions of Section 3450 Revised Statutes; it is stipulated that Hans P. Mortensen would testify that on the night in question, just prior to the seizure, he drove up to the back of the Sequoia Hotel in the respondent automobile in which liquor was found; it is further stipulated, however, that Paul L. Mathias, Prohibition Agent, would testify that when he arrived at the rear of the hotel to make the seizure, the Willys-Knight automobile was standing still, and at the time when the seizure was actually made, it was not in motion

V.

That on the 3rd day of October,1928, the said Paul L. Mathias swore out a complaint before Samuel F. Hollins, United States Commissioner at Fresno, Cali-

fornia, in which he charged that the said Hans P. Mortensen, alias H. P. Bender, did, on the 27th day of September, 1928, unlawfully possess and transport Twelve (12) one pint bottles of intoxicating liquor; that on the 19th day of November, 1928, an Information was filed charging the said Hans P. Mortensen with violation of Section 3450 Revised Statutes; that on the 21st day of November, 1928, the said Hans P. Mortensen was arraigned upon said charge and pleaded guilty to violating the criminal provisions of Section 3450 Revised Statutes, and was fined in the sum of Two Hundred Fifty Dollars ($250.00) for the violation thereof;

VI.

That the Davies Motors, Inc., is a corporation, organized and existing under and by virtue of the State of California, and authorized to do business and is doing business as a dealer in Willys-Knight automobiles. in the City of San Diego, State of California;

VII.

That on the 3rd day of May, 1927, Mrs. H. P. Mortensen purchased from said corporation a Willys-Knight automobile under a conditional contract of sale, pursuant to which said corporation retained the title thereof until the purchase price should have been fully paid; that at the time of said sale, said corporation, in accordance with its custom, required and secured a credit statement from said purchaser in which said purchaser alleged that H. P. Mortensen, her husband hereinabove mentioned, was engaged in the interior decorating business on his own account and had been so engaged for a period of eight years; that as

assets said purchaser listed a house and lot in Omaha, Nebraska, of the then value of Eight Thousand Dollars ($8,000.00) and also gave two references, both of which said corporation investigated and found satisfactory; that said purchaser made the payments on said car regularly and on the due date, and on June 22, 1928, at the solicitation of one of said corporation's salesmen, said purchaser traded in the Willys-Knight automobile purchased on May 3, 1927, and purchased the Willys-Knight Roadster, engine #27-260, referred to above, on conditional sales contract under and pursuant to the terms of which said corporation retained the title thereto until all payments should have been completed; that the sale price of the said Willys-Knight Roadster purchased on June 22, 1928, was Thirteen Hundred Ninety-five ($1395.00) Dollars; that under the sale contract entered into between the purchaser and the said Davies Motors, Inc., the purchaser was required to make payments in the sum of Fifty-seven Dollars ($57.00) per month, commencing on July 22, 1928; that the net balance due on the said July 22, 1928, after allowing deductions for the trade in value for another car was Eight Hundred Ninety-six Dollars ($896.00); that the payment due on July 22, 1928, was not paid and that the claimant herein ascertained that the purchaser and her husband, H. P. Mortensen, had moved to Fresno, California, and thereupon demand was made upon the purchaser, and part of the said Fifty-seven Dollars ($57.00) was paid on August 6, and the balance thereof on August 7, 1928;

VIII.

That Davies Motors, Inc., Claimant herein, had no notice that said automobile was being used for illegal purposes, as charged in this Libel, or otherwise, and knew of no facts or circumstances which would reasonable or otherwise lead them to believe that the automobile was being so used; that the Davies Motors, Inc., is now and at all times mentioned, the legal owner of said Willys-Knight automobile; that no payments have been made under and pursuant to the aforementioned conditional sale contract since the 7th day of August, 1928, and that the said Davies Motors, Inc., is under and pursuant to the terms thereof entitled to the immediate and exclusive possession of said automobile and to all legal and equitable rights therein as the exclusive owner thereof.

SAMUEL W. McNABB
United States Attorney
Harry Graham Balter
HARRY GRAHAM BALTER
Assistant United States Attorney,
Attorneys for Libelant.

YOUNG & YOUNG,
By De Forrest Home
Attorney for Claimant, Davies Motors, Inc.

DATED: This 17 day of April, 1929.

[Endorsed]: Filed Apr. 17, 1929. R. S. Zimmerman, Clerk, by Murray E. Wire, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This matter was submitted to the Honorable William P. James, Judge of the District Court of the Southern District of California, for his decision on the stipulation of facts entered into by and between Libelant, appearing by SAMUEL W. McNABB, United States Attorney for the Southern District of California, and HARRY GRAHAM BALTER, Assistant United States Attorney for the said District, and the Intervenor, and Claimant, DAVIES MOTORS, INC., a Corporation, appearing by YOUNG & YOUNG and DE FOREST HOME, an oral argument having been had, from the aforesaid stipulation the Court finds;

I.

That on or about the 27th day of September, 1928, Paul L. Mathias was and is a duly authorized and Acting Agent of the Commissioner of Prohibition of the United States;

II.

That on or about the 27th day of September, 1928, in the City of Fresno, County of Fresno, and within the Northern Division of the Southern District of California, the said Paul L. Mathias, acting on behalf of and for the said Commissioner of Prohibition of the United States, seized a certain Willys-Knight Roadster automobile, Engine No. 27-260, being the same automobile as is the respondent in the above named libel;

III.

That at the time the said respondent automobile was seized, as aforesaid, there was concealed and deposited therein, certain goods, merchandise and commodities, to-wit: Five (5) Pints of distilled spirits; that the said distilled spirits were fit for beverage purposes and then and there contained more than one-half of one per cent of alcohol by volume; that there was due upon the said Five (5) pints of distilled spirits, certain taxes imposed by the Act of November 23, 1921, known as the Willis-Campbell Act, and by the Revenue Act of 1921; that at the time when the said distilled spirits were concealed and deposited in the said automobile, as aforesaid, the taxes due thereon were unpaid and still remain unpaid; that there were no marks, stamps or labels on the said bottles of said distilled spirits to indicate that said taxes due thereon had been paid;

IV.

That the facts of the seizure are as follows: That on the evening of September 27, 1928, Agent Paul L. Mathias stationed himself in the rear of the Sequoia Hotel in the City of Fresno, State of California, and there saw one Hans P. Mortensen, alias H. P. Bender, in the act of removing Five (5) Pints of Mexican Smuggled Whiskey, bearing the label "Border Bell Bourbon Whiskey, etc.", from the said respondent automobile; that the said Mortensen had deposited and concealed the said smuggled whiskey in the respondent automobile with the intent to defraud the United States Government of the taxes due thereon; in violation of the provisions of Section 3450 Revised Statutes; that at the time of the arrest, the respond-

ent vehicle was being used by said Mortensen for the purpose of transporting the liquor seized therein.

V.

That on the 3rd day of October, 1928, the said Paul L. Mathias swore out a complaint before Samuel F. Hollins, United States Commissioner at Fresno, California, in which he charged that the said Hans P. Mortensen, alias H. P. Bender, did, on the 27th day of September, 1928, unlawfully possess and transport Twelve (12) one pint bottles of intoxicating liquor; that on the 19th day of November, 1928, an Information was filed charging the said Hans P. Mortensen with violation of Section 3450 Revised Statutes; that on the 21st day of November, 1928, the said Hans P. Mortensen was arraigned upon said charge and pleaded guilty to violating the criminal provisions of Section 3450 Revised Statutes, and was fined in the sum of Two Hundred Fifty Dollars ($250.00) for the violation thereof;

VI.

That the Davies Motors, Inc., is a corporation, organized and existing under and by virtue of the State of California, and authorized to do business and is doing business as a dealer in Willys-Knight automobiles, in the City of San Diego, State of California;

VII.

That on the 3rd day of May, 1927, Mrs. H. P. Mortensen purchased from said corporation a Willys-Knight automobile under a conditional contract of sale, pursuant to which said corporation retained the title thereof until the purchase price should have been fully paid; that at the time of said sale, said corpora-

tion, in accordance with its custom, required and secured a credit statement from said purchaser in which said purchaser alleged that H. P. Mortensen, her husband hereinabove mentioned, was engaged in the interior decorating business on his own account and had been so engaged for a period of eight years; that as assets said purchaser listed a house and lot in Omaha, Nebraska, of the then value of Eight Thousand Dollars ($8,000.00) and also gave two references, both of which said corporation investigated and found satisfactory; that said purchaser made the payments on said car regularly and on the due date, and on June 22, 1928, at the solicitation of one of the said corporation's salesmen, said purchaser traded in the Willys-Knight automobile purchased on May 3, 1927, and purchased the Willys-Knight Roadster, engine #27-260, referred to above, on conditional sales contract under and pursuant to the terms of which said corporation retained the title thereto until all payments should have been completed; that the sale price of the said Willys-Knight Roadster purchased on June 22, 1928, was Thirteen Hundred Ninety-Five ($1395.00) Dollars; that under the sale contract entered into between the purchaser and the said Davies Motors, Inc., the purchaser was required to make payments in the sum of Fifty-Seven Dollars ($57.00) per month, commencing on July 22, 1928; that the net balance due on the said July 22, 1928, after allowing deductions for the trade in value for another car was Eight Hundred Ninety-Six Dollars ($896.00); that the payment due on July 22, 1928, was not paid and that the claimant herein ascertained that the purchaser and her husband, H. P. Mortensen, had moved

to Fresno, California, and thereupon demand was made upon the purchaser, and part of the said Fifty-Seven Dollars ($57.00) was paid on August 6, and the balance thereof on August 7, 1928;

VIII.

That Davies Motors, Inc., Cal*i*mant herein, had no notice that said automobile was being used for illegal purposes, as charged in this Libel, or otherwise, and knew of no facts or circumstances which would reasonably or otherwise lead them to believe that the automobile was being so used; that the Davies Motors, Inc., is now and at all times mentioned, the legal owner of said Willys-Knight automobile; that no payments have been made under and pursuant to the aforementioned conditional sale contract since the 7th day of August, 1928, and that the said Davies Motors, Inc., is under and pursuant to the terms thereof entitled to the immediate and exclusive possession of said automobile and to all legal and equitable rights therein as the exclusive owner thereof.

FROM THE FOREGOING FACTS THE COURT FINDS AS CONCLUSIONS OF LAW:

I.

That the above named vehicle should be forfeited to the United States of America for violation of the provisions of Section 3450 Revised Statutes:

That the Libelant, United States of America, should recover from the Intervenor and Claimant, Davies Motors, Inc. its costs of suit and the storage and warehouse charges properly incurred since the date of seizure.

DATED: This 20 day of June, 1929.

Wm P James
United States District Judge.

APPROVED AS TO FORM AS
PROVIDED IN RULE 44.
Young & Young
by De Forrest Home

[Endorsed]: Received copy of within this 6 day of June, 1929 Young & Young by De Forrest Home. Filed Jun. 20, 1929 R. S. Zimmerman, Clerk. By D. W. Ramsey, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

DECREE

This matter was submitted to the Honorable William P. James, Judge of the District Court of the Southern District of California, for his decision on the stipulation of facts entered into by and between Libelant, appearing by SAMUEL W. McNABB, United States Attorney for the Southern District of California, and HARRY GRAHAM BALTER, Assistant United States Attorney for the said District, and the Intervenor and Claimant, DAVIES MOTORS, INC., a Corporation, appearing by YOUNG & YOUNG and DE FOREST HOME, and the Court having filed its Findings of Fact and Conclusions of Law:

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the automobile described in the Libel in this case be, and the same accordingly is condemned as forfeited to the United States, and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Clerk of this Court issue a writ of Venditioni Exponas directed to the Marshall of the Southern District of California, commanding him to sell the aforesaid automobile, its tools and appurtenances at public action, after giving notice as required by law by publishing the notice of sale in a newspaper of general circulation, published in or near the place of sale, the first publication of said notice to be at least fourteen (14) days prior to the date of said sale, and that upon the return of the said writ into this Court, the said Marshal deposit the proceeds with the Clerk of this Court to be disposed of as provided by law;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Libelant, United States of America, recover from the Intervenor and Claimant, Davies Motors, Inc., its costs of suit incurred herein together with the storage and other charges incurred for the maintenance of said vehicle since the date of seizure. Costs taxed at $77.55.

DATED: This 20 day of June, 1929.

Wm P James

United States District Judge.

APPROVED AS TO FORM AS
PROVIDED IN RULE 44.
Young & Young
By De Forrest Home

Decree entered and recorded Jun 20 1929 R. S. Zimmerman, Clerk, by Murray E. Wire Deputy Clerk.

[Endorsed]: Received copy of within this 6 day of June 1929 Young & Young by De Forrest Home

Attorney for Intervenor. Filed Jun 20 1929 R. S. Zimmerman, Clerk by D. W. Ramsey Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ORDER

Upon the Stipulation of the parties and good cause appearing therefore and it appearing to the court that a good and satisfactory bond has been filed with the court in the sum of Four Hundred Dollars ($400.00) conditioned that in the event final judgment herein is entered in favor of libelant that said surety will pay to the libelant the said sum of Four Hundred Dollars ($400.00).

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that said bond shall be substituted and it is hereby accepted in the place and stead of said respondent automobile and that all further proceedings herein shall be against said bond;

IT IS FURTHER ORDERED that said respondent automobile, to wit: One Willys-Knight Roadster Automobile, Engine #27-260, be delivered to the intervener, or its agent, free from any further claim or lien of the libelant herein.

Done in open court this 20 day of June, 1929.

Wm P. James

Judge.

[Endorsed]: Filed Jun. 20, 1929. R. S. Zimmerman, Clerk, by D. W. Ramsey, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

AMENDMENT TO DECREE AND ORDER FOR RELEASE OF AUTOMOBILE.

It appearing to the Court that Stipulation of the parties has heretofore been filed herein, to-wit: on June 20, 1929, providing for the release of the respondent automobile herein upon the filing with the Court of a good and satisfactory bond in the sum of Four Hundred ($400.00) Dollars to be substituted in the place and stead of the respondent automobile herein, and good cause appearing therefor:

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Final Decree heretofore filed herein be modified to the extent that the order for sale of the said automobile be and the same is hereby vacated, and

IT IS FURTHER ORDERED that the said respondent automobile, to-wit: One Willys-Knight Roadster Automobile, Engine No. 27-260, be and the same is hereby ordered released to the Intervenor or its Agent upon the payment of all storage charges heretofore incurred by the United States of America concerning said automobile, and upon the posting with the Court of a good and satisfactory bond in the sum of Four Hundred ($400.00) Dollars, to be approved by the Court, conditioned that in the event the Final Decree heretofore entered herein becomes final, by lapse of time within which appeal may be taken or be affirmed upon appeal in the event an appeal is taken, then and in that event the Surety on said bond will pay to the Libelant the said sum of Four Hundred

($400.00) Dollars, within ten (10) days after notice of said decree having become final or affirmed on appeal, and that if not so paid within said ten (10) day period execution may issue therefor, and that in the event the decree herein shall be reversed and final judgment entered for the Intervenor, then said bond shall be exonerated and the obligation thereunder terminated; and

IT IS FURTHER ORDERED that said bond shall be substituted in the place and stead of said respondent automobile herein and that all further proceedings herein shall be against said bond.

DATED: This 26 day of June, 1929.

Wm. P. James
United States District Judge.

APPROVED AS TO FORM
Samuel W. McNabb
SAMUEL W. McNABB,
United States Attorney,
Ignatius F. Parker
IGNATIUS F. PARKER,
Assistant United States Attorney.
Attorneys for Libelant.
YOUNG & YOUNG,
By De Forrest Home
De Forest Home.
Attorneys for Intervenor.

Decree entered and recorded Jun 26 1929 R. S. ZIMMERMAN Clerk. By Murray E. Wire Deputy Clerk

[Endorsed]: Filed Jun. 26, 1929. R. S. Zimmerman, Clerk, by Murray E. Wire Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

PETITION FOR APPEAL.

To the Honorable William P. James, Judge of the above entitled court:

Comes now Davies Motors, Inc., Intervener herein, by its attorneys, Young & Young, and feeling it is aggrieved by the final decree entered in this action, hereby prays that an appeal may be allowed, to-wit: From the United States District Court for the Southern District of California, Northern Division to the United States Circuit Court of Appeals to the Ninth Circuit and in connection with this petition petitioner hereby presents its assignment of errors.

YOUNG & YOUNG,
By De Forrest Home
Attorneys for Intervener.

Dated: June 27, 1929.

[Endorsed]: Filed Jun. 28, 1929. R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ASSIGNMENT OF ERRORS.

Comes now Davies Motors, Inc. intervener herein by its attorneys, Young and Young, and alleges in its petition for appeal that in the record proceedings and in the final judgment of the above entitled action material error has intervened to the substantial prejudice of the plaintiff, towit:

I.

That the Honorable Court erred in its conclusions of law, in that it concluded that the respondent auto-

mobile herein should be forfeited to the United States of America for a violation of the provisions of Section 3450 Revi*des* Statutes.

II.

That the Honorable Court herein erred in that in its conclusions of law it concluded that the United States of America should recover from the intervener-claimant, Davies Motors, Inc., its costs of suit herein incurred and its storage and warehouse charges incurred since the date of seizure.

III.

That the Honorable Court erred in its decree entered herein in this, that said decree ordered, adjudged and decreed that the judgment be for the libelant and that the respondent automobile be declared forfeited to the libelant and that said libelant recover its costs of action for storage charges from the intervener and that said decree and all thereof was contrary to law and should have been rendered in favor of Davies Motors, Inc., the intervener, dismissing said libel and said respondent automobile, and ordering said respondent automobile released to the intervener free from all claim of the libelant.

WHEREFORE, Intervener prays that the decree herein be reversed and that the above entitled court be ordered to enter a decree declaring the above named respondent automobile released to the intervener and dismissing the libel herein and adjudging said respondent automobile and/or the bond substituted in

its place free from any claim, right, title or interest of the libelant herein.

Dated this 28th day of June, 1929.

YOUNG & YOUNG
By De Forrest Home
Attorneys for Intervener.

We hereby certify that the foregoing assignment of errors is made on behalf of the intervener herein for an appeal and it is our opinion and the same now constitutes an assignment of errors upon the appeal prayed for.

YOUNG & YOUNG
By De Forrest Home
Attorneys for Intervener.

[Endorsed]: Filed Jun. 28, 1929 R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ORDER ALLOWING APPEAL.

Good cause appearing therefor,

IT IS ORDERED that the Appeal prayed for in the petition for Appeal in the above entitled action be and the same hereby is allowed.

IT IS FURTHER ORDERED that the bond in the amount of $250.00 heretofore filed in the above entitled action guaranteeing the payment of costs in said action may be and it hereby is accepted in the place and stead of any Further bond on appeal, and any costs recoverable by the libelant herein shall be charge-

able against and recoverable from said bond heretofore approved and filed.

Dated: June 28, 1929.

Wm P. James
United States District Judge for the Southern District of California.

[Endorsed]: Filed Jun. 28, 1929. R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

UNDERTAKING FOR COSTS.

WHEREAS, the Davies Motors, Inc. a corporation, has appeared herein as an intervener in a libel filed on behalf of the United States of America, and

WHEREAS, security for costs that may be awarded against said intervener is required,

NOW, THEREFORE, the undersigned, a corporation, organized and existing under and by virtue of the laws of the State of New York, in consideration of the premises herewith undertakes in the sum of TWO HUNDRED FIFTY AND NO/100 ($250.00) DOLLARS and promises to the effect that it will pay such amount not exceeding Two hundred fifty and no/100 ($250.00) Dollars, as may be adjudged as costs against said Davies Motors, Inc., in or pursuant to the above entitled action.

IN WITNESS WHEREOF said corporation has signed the foregoing undertaking by its duly authorized attorney in fact this 22nd day of January, 1929.

AMERICAN SURETY COMPANY OF NEW YORK
[SEAL]

By J. C. Ashburn
Resident Vice President.
Attest: H. R. Durrow
Resident Assistant Secretary.

Premium charged for this bond is $10.00 per annum.

STATE OF CALIFORNIA)
) SS.:
County of Los Angeles.)

ON THIS 22nd day of January A. D. 1929, before me, FRANK MCWHORTER a Notary Public in and for Los Angeles County, State of California, residing therein, duly commissioned and sworn, personally appeared J. C. ASHBURN personally known to me to be the Resident Vice-President and H. R. DURROW personally known to me to be the Resident Assistant Secretary of the AMERICAN SURETY COMPANY OF NEW YORK, the Corporation described in and that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[SEAL] Frank McWhorter
Notary Public in and for the County of Los Angeles, State of California.

My Commission expires
My Commission Expires Feb. 3, 1932.

[Endorsed]: Filed Jan 22 1929 R. S. Zimmerman, Clerk By M. L. Gaines, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

UNDERTAKING ON RELEASE OF AUTOMOBILE.

WHEREAS, a final decree has been entered in the above entitled action in favor of the Libelant herein; and

WHEREAS, the Court has ordered the respondent automobile released and delivered to the intervener upon deposing a bond to be approved by the Court, in the penal sum of Four Hundred Dollars ($400.00);

NOW, THEREFORE, the undersigned, a corporation organized and existing under and by virtue of the laws of the State of New York, surety herein, in consideration of the premises herein, undertakes in the sum of Four Hundred Dollars ($400.00), and promises that in the event the final decree herein shall become final, or by lapse of time within which an appeal may be taken, or by affirmance on appeal, in the event an appeal is taken, in favor of the libelant, that said surety will pay to said libelant within ten (10) days after notice that the final decree has become final, as aforesaid, or has been affirmed on appeal, as aforesaid, the said sum of Four Hundred Dollars ($400.00).

In the event that said final decree shall be reversed on appeal and/or shall become final in favor of the intervener, no responsibility shall attach to said surety under the provisions of this bond, and the obligation thereunder will be discharged.

IN WITNESS WHEREOF, said corporation has signed the foregoing undertaking by its duly authorized attorney-in-fact this 26th day of June, 1929.

AMERICAN SURETY COMPANY OF
[SEAL] NEW YORK
By A. M. Wold
Resident Vice-President
ATTEST: H. R. Durrow
Resident Assistant-Secretary.

Approved as to form in accordance with Rule 44.
SAMUEL W. McNABB,
United States Attorney,
By Ignatius F. Parker, Asst. U. S. Atty.
Attorney for Libelant.
YOUNG & YOUNG,
By De Forrest Home
Attorneys for Intervener.

Bond approved by the court this 26th day of June, 1929.

Wm. P. James,
Judge.

Premium charged for this bond is $10.00 for the term.

STATE OF CALIFORNIA)
) ss.:
COUNTY OF LOS ANGELES.)

ON THIS 26th day of June A. D. 1929, before me FRANK MCWHORTER a Notary Public in and for Los Angeles County, State of California, residing therein, duly commissioned and sworn, personally appeared A. M. WOLD personally known to me to be the Resident Vice-President and H. R. DURROW personally known to me to be the Resident Assistant Secretary of the AMERICAN SURETY COMPANY [SEAL] OF NEW YORK, the Corporation described in and that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

Frank McWhorter

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires

My Commission Expires Feb. 3, 1932.

[Endorsed]: Received copy of the within this 26th day of June 1929 I. F. Parker Asst. U. S. Atty Attorney for Libelant. Filed Jun 26 1929 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

STIPULATION OMITTING TITLE.

IT IS HEREBY STIPULATED by and between the parties hereto, thru their respective counsel, that in the printing of the transcript on appeal herein the title of the court, and the title of the cause, and the captions on the pleadings may be indicated thus (Title of Court and Cause) and need not be printed in full, and that the endorsement on such papers or documents, excepting filing endorsements, may also be omitted.

SAMUEL W. McNABB,
United States Attorney.
By Ignatius F. Parker
Assistant United States Atty.
Attorneys for Libelant
YOUNG & YOUNG,
By De Forrest Home
Attorneys for Intervener.

Approved: this 3 day of July 1929.

Wm. P. James
United States District Judge for the
Southern District of California.

[Endorsed]: Filed July 3, 1929. R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy.

[TITLE OF COURT AND CAUSE.]

PRAECIPE TO THE CLERK OF SAID COURT.

You are hereby notified to prepare and certify copies of such papers filed and all such proceedings had in the above entitled action as are necessary to the determination of the cause on appeal and in particular the following instruments.

1. Libel.
2. Petition in intervention of Davies Motors, Inc.
3. Stipulation of Facts.
4. Findings of Fact and Conclusions of Law.
5. Decree.
6. Order dated June 26, 1929 to release automobile upon substitution of bond.
7. Order approving bond dated June 26, 1929.
8. Petition for Appeal.
9. Order allowing appeal.
10. Assignment of Errors.
11. Citation on Appeal.
12. Stipulation and order omitting title of the court and title of the cause.
13. Order approving prior bond.
14. Praecipe.

Dated this 28th day of June, 1929.

YOUNG & YOUNG,
By De Forrest Home
Attorneys for Intervener.

[Endorsed]: Received copy of the within Praecipe this 28th day of June 1929 Ignatius F. Parker Asst. U. S. Attorney for Libelant Filed Jun 28 1929 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 44 pages, numbered from 1 to 44 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; libel; complaint in intervention; stipulation of facts; findings of fact and conclusions of law; decree; order; amendment to decree and order for release of automobile; petition for appeal; assignment of errors; order allowing appeal; undertaking for costs; undertaking on release of automobile; stipulation omitting titles, and praecipe.

I DO FURTHER CERTIFY the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to $7.10 and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, South-

ern Division, this 24th day of July, in the year of Our Lord One Thousand Nine Hundred and Twenty-nine, and of our Independence the One Hundred and Fifty-fourth.

R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

(Seal)

By EDMUND L. SMITH,
Deputy.

No. 5889

United States
Circuit Court of Appeals
For the Ninth Circuit.

DAVIES MOTORS, INC.,
Intervenor and Appellant,
vs.
UNITED STATES OF AMERICA,
Libelant and Appellee,
ONE WILLYS-KNIGHT ROADSTER AUTOMOBILE, Engine #27-260,
Respondent.

Upon Appeal from the United States District Court for the Southern District of California, Northern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1929, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the sixteenth day of October, in the year of our Lord one thousand nine hundred and twenty-nine. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable FRANK S. DIETRICH, Circuit Judge; Honorable CURTIS D. WILBUR, Circuit Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED above cause argued by Mr. De Forrest Home, counsel for the appellant, and by Mr. Emmett E. Doherty, Assistant United States Attorney, counsel for the appellee, and submitted to the Court for consideration and decision, with leave to counsel to file stipulation concerning certain facts.

[Title of Court and Cause.]

STIPULATION.

WHEREAS, some uncertainty has arisen with reference to the intent of the parties and of the Court in using the word "smuggled" in the transcript of record, and

WHEREAS, there was no question raised upon the trial of the issues of fact as to the smuggling of the liquor in question into the United States either by the driver of the respondent automobile, or by anyone else, and

WHEREAS, the Circuit Court of Appeals for the Ninth Circuit in open court has granted the parties hereto permission to file the within stipulation,—

NOW, THEREFORE, IT IS STIPULATED by and between the parties hereto, thru their respective attorneys, that wherever the word "smuggled" or any related word or words appears or appear in the transcript of record or in the briefs on appeal, the same may be stricken from the record and that the Court of Appeals may hear and determine the above-entitled case in the same manner and with the same effect as if said word or words had been omitted entirely; this stipulation has particular reference to page 22, line 2 of the transcript of record which should read, "five pints of Mexican whiskey," instead of "five pints of Mexican smuggled whiskey," page 27, line 6 of the transcript of record, which should read "five pints of Mexican whiskey," instead of "five pints of Mexican smuggled whiskey," and to any other place where said word or its equivalent appears.

Dated this 21st day of October, 1929.

SAMUEL W. McNABB.
SAMUEL W. McNABB,
United States Attorney.
HARRY GRAHAM BALTER.
HARRY GRAHAM BALTER,
Assistant United States Attorney.
EMMETT E. DOHERTY.
EMMETT E. DOHERTY,
Assistant United States Attorney.
YOUNG & YOUNG,
By DE FORREST HOME,
Attorneys for Intervener.

[Endorsed]: Stipulation. Filed Oct. 23, 1929. Paul P. O'Brien, Clerk.

At a stated term, to wit, the October Term, A. D. 1929, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the twelfth day of November, in the year of our Lord one thousand nine hundred and twenty-nine. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable FRANK S. DIETRICH, Circuit Judge; Honorable CURTIS D. WILBUR, Circuit Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the Honorable Frank H. Rudkin, Frank S. Dietrich and Curtis D. Wilbur, Circuit Judges, before whom the cause was heard, ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the Clerk and that a decree be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION U. S. CIRCUIT COURT OF APPEALS.

Before RUDKIN, DIETRICH and WILBUR, Circuit Judges.

WILBUR, Circuit Judge.—The intervener and appellant sold the Willys-Knight roadster automobile, respondent herein, to one Hans P. Mortensen by a conditional sales contract under which it retained ownership of the automobile. At the time the automobile was seized by a Government prohibition agent September 27, 1928, the balance due on the purchase price was $896.00. The district attorney filed a libel under section 3450, Revised Stat-

utes (26 U. S. C. A., § 1181), alleging that at the time the automobile was seized it contained twelve pint bottles of intoxicating liquor which had been concealed therein with the intent to defraud the United States Government of the taxes due thereon. The sole question presented by the appeal is whether or not, under the facts stipulated by the parties and found by the trial court, the rights of the intervener are forfeited under section 3450, or whether, being innocent of all complicity in the wrongful acts of Mortensen, it can invoke the provisions of section 26 of the National Prohibition Act (27 U. S. C. A., § 40).

It appears from the stipulation that at the time the automobile was seized by Paul L. Mathias, prohibition agent, he had stationed himself in the rear of the Sequoia Hotel in Fresno and saw Mortensen remove five pints of whiskey from the respondent automobile.

It is stipulated that the prohibition agent would testify that when he arrived at the rear of the hotel to make the seizure the Willys-Knight automobile was standing still and at the time the seizure was actually made it was not in motion, and that Mortensen would testify that on the night in question just prior to the seizure he drove up to the back of the Sequoia Hotel in the respondent automobile in which the liquor was found. Upon this stipulation the Court found that at the time of the arrest the respondent vehicle was being used by Mortensen for the purpose of transporting liquor seized

therein. On October 3, 1928, the prohibition agent swore out a complaint before the United States Commissioner in which he charged that Hans P. Mortensen did, on the 27th day of September, 1928 "unlawfully possess and transport twelve one pint bottles of intoxicating liquor." On the 19th of November, 1928, an information was filed charging the said Hans P. Mortensen with violation of section 3450, Rev. Stat. On the 21st day of November, 1928, Mortensen pleaded guilty to violating the criminal provisions of section 3450 of the Rev. Stats. and was fined $250 for the violation thereof.

The United States Circuit Court of Appeals for the Fourth Circuit has recently rendered an opinion under a similar state of facts holding that a forfeiture under section 3450, Rev. Stats., was proper. In that case the facts were more favorable to the intervener than in this case for the reason that there the prohibition officer stopped the offending automobile which was being operated along the highway and upon searching the car found "twelve gallons of whisky." In that case the Court said:

> "An intervening petition claiming the car was filed by the Richbourg Motor Company, the innocent holder of an unsatisfied purchase-money lien thereon, but the District Judge ordered it forfeited, and the motor company has appealed.
>
> "We think that the decree of forfeiture was clearly correct. U. S. vs. One Ford Coupe, 272 U. S. 321, 331, 47 S. Ct. 154, 71 L. Ed.

279, 47 A. L. R. 1025; U. S. vs. Commercial Credit Co. (C. C. A. 4th), 20 F. (2d) 519; General Motors Acceptance Corporation vs. U. S. (C. C. A. 4th), 23 F. (2d) 799. The case at bar differs from the cases of Port Gardner Investment Co. vs. U. S., 272 U. S. 564, 47 S. Ct. 165, 71 L. Ed. 412, and Commercial Credit Co. vs. U. S., 276 U. S. 266, 48 S. Ct. 232, 72 L. Ed. 541, in that in those cases the persons in the automobiles which were proceeded against were prosecuted and convicted under the National Prohibition Act, and it was held that this precluded the government from resorting to proceedings under section 3450 against the automobiles. Here the United States attorney has elected to proceed against the occupants of the car, as well as against the car itself, under the revenue statutes." (Richbourg Motor Co. vs. U. S., 34 F. (2d) 38.)

In so deciding that Court followed its previous decision (The United States vs. Commercial Credit Co., 20 Fed. 519), where it dealt with the subject at length. And also its decision in the case of Gen. Motors Acceptance Corp. vs. U. S., 23 Fed. (2d) 799, decided January 10, 1928, where it stated the rule by which it had been guided in these cases, as follows:

"This court has held that an automobile may be seized for violation of section 3450, Revised Statutes, and proceeded against under section 26 of title 2 of the National Prohibition

Act, or *vice versa*, and that the report or action of the seizing officers does not bind the government to an election as to which section may be used in the forfeiture proceeding."

The Circuit Court of Appeals of the Fifth Circuit, however, in United States vs. Gen. Motors Acceptance Corp., 25 Fed. (2d) 238, reached the opposite conclusion, as shown by the following quotation from its opinion therein:

"* * * * Assuming that it is possible to prove that one who uses a vehicle in the removal or for the deposit or concealment of untax-paid liquor has the necessary intent under section 3450 to defraud the United States of a tax which existing law neither requires nor permits to be paid, it is nevertheless true that, if a person be caught in the act of unlawfully transporting liquor in a vehicle, there is no authority of law to proceed under section 3450, either to prosecute the person or to forfeit the vehicle."

In reaching its conclusion that court considered the recent decisions by the Supreme Court bearing upon that question including those above cited, and also the later opinion in Commercial Credit Co. vs. U. S., 276 U. S. 226, but said:

"In our opinion proceedings taken after the arrest and seizure are immaterial, as it was the duty of the government under section 26 to prosecute him for unlawful possession and transportation."

The above decision, by the Circuit Court of Appeals for the Fifth Circuit, may be distinguished from the facts in the case before us for the reason that in the case at bar, although as a matter of fact the automobile was being used for the transportation of liquor, there is no evidence that the prohibition agent witnessed the transportation and it is stipulated in effect that he would testify that he did not. We are disposed to follow the decisions and the line of reasoning of the Circuit Court of Appeals of the Fourth Circuit above quoted. The Supreme Court has held that after conviction for violation of section 26 of the National Prohibition Act the offending vehicle cannot be libeled under section 3450. (Commercial Credit Co. vs. U. S., *supra.*) It seems clear to us that notwithstanding section 26 of the National Prohibition Law provides that the arresting officer shall proceed thereunder to prosecute the offender and to forfeit the offending vehicle, that this provision must be construed with relation to the duties of the United States attorney upon the presentation of the matter to him by the arresting officer. It is the duty of the United States attorney to enforce all the criminal laws (R. S. 771, 28 U. S. C. A. 485), and where there are two criminal laws apparently violated at the same time or by substantially the same act, he must determine whether he will prosecute either or both and that determination must be based in a measure on his judgment as to the probable results of the prosecution. A Judge in a civil action may un-

hesitatingly decide the facts to be that the vehicle in question was engaged in transporting liquor in violation of the National Prohibition Act, but in a criminal prosecution that fact must be established beyond a reasonable doubt in the minds of each of twelve jurors, and where the evidence is circumstantial the circumstances shown to the jury must be inconsistent with every reasonable hypothesis other than that of guilt. The prohibition officer may testify that the automobile in question was in motion at the time of the arrest, but the United States attorney is not required to accept his statement and the jury may entirely disregard his sworn testimony to that effect. Regardless of the assertions of those who bring the facts to the attention of the United States attorney he must determine what facts, in his judgment, he can establish before a jury in a criminal case, and his action should be in accordance with that determination. We see no reason for holding that the United States attorney is bound to proceed under section 26 because the officer who seizes the automobile and makes the arrest asserts the fact to be that the automobile was actually in motion at the time of the arrest or immediately prior thereto, and that the transportation of intoxicating liquor in the automobile was observed by him. Experience may demonstrate to the United States attorney that a conviction on the evidence could not be obtained. If the United States attorney can properly proceed under the facts brought to his attention under either section

26 of the National Prohibition Law or under section 3450 of the Revised Statutes, the mere fact that section 26 of the National Prohibition Act provides that the arresting officer "shall at once proceed against the person arrested under the provisions of this title," does not make it the duty of the United States attorney to proceed under section 26. The officer making the arrest can only proceed by and through the United States attorney and when he has brought the facts to the United States attorney that officer must determine the course that shall be thereafter pursued. By section 3450 it is provided that if the vehicle was used for the concealing of liquor with intent to defraud the United States of the tax thereon, it shall be forfeited to the United States.

Section 838 of the Revised Statutes (19 Stat. 241; 28 U. S. C. A. 486) provides that:

> "It shall be the duty of every district attorney to whom any collector of customs, or of internal revenue, shall report, according to law, any case in which any fine, penalty, or forfeiture, has been incurred in the district of such attorney for the violation of any law of the United States relating to the revenue, to cause the proper proceedings to be forfeitures in such case provided, unless, upon inquiry and examination, he shall decide that such proceedings cannot probably be sustained, or that the ends of public justice do not require that such proceedings should be instituted; in which case

he shall report the facts in customs cases to the Secretary of the Treasury, and in internal revenue cases to the Commissioner of Internal Revenue for their direction."

It is as much the duty of the district attorney to proceed under this law as it is under the National Prohibition Act. He must determine the proper course to pursue. As was said by the Supreme Court of the United States in Confiscation Cases, 7 Wall. 454 (74 U. S. 454), 457:

> "Public prosecutions, until they come before the court to which they are returnable, are within the exclusive direction of the district attorney, and even after they are entered in court, they are so far under his control that he may enter a *nolle prosequi* at any time before the jury is empanelled for the trial of the case, except in cases where it is otherwise provided in some act of Congress.
>
> " * * * Settled rule is that those courts will not recognize any suit, civil or criminal, as regularly before them, if prosecuted in the name and for the benefit of the United States, unless the same is represented by the district attorney, or some one designated by him to attend to such business, in his absence, as may appertain to the duties of his office."

Judgment affirmed.

[Endorsed]: Opinion. Filed Nov. 12, 1929. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 5889.

DAVIES MOTORS, INC., a Corporation, Claimant of One Willys-Knight Roadster Automobile, Engine #27-260,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the Southern District of California, Northern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of California, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed.

[Endorsed]: Decree. Filed and entered Nov. 12, 1929. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-one (61) pages, numbered from and including 1 to and including 61, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel on behalf of the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 6th day of January, A. D. 1930.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 24, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, and the case is assigned with case No. 452, Richbourg Motor Company, Intervenor, vs. United States of America, for argument as one case.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

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CHARLES ELMORE C
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IN THE

Supreme Court of the United States

..... TERM.

No. 569

DAVIES MOTORS INC. (a corporation),

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

DUANE R. DILLS,
Counsel for Petitioner,
100 East 42nd Street,
New York City.

DeFORREST HOME,
CHARLES W. HASWELL,
Of Counsel.

Pandick Press, Inc., 32 Thames St., New York, U. S. A.

IN THE

Supreme Court of the United States

..... TERM.

DAVIES MOTORS INC. (a corporation),
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

No. .....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Davies Motors Inc., by Duane R. Dills, its counsel, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above entitled case on November 12, 1929, confirming the decision of the United States District Court for the Southern District of California, Northern Division, and respectfully shows as follows:

1. The decision of the United States Circuit Court of Appeals in this case is not yet reported, but may be found in the record filed with this petition (R. 52).

2. This case brings up for decision by the United States Supreme Court the question which was expressly left open in *United States* v. *One Ford Coupe*, 272 U. S. 321; *Port Gardner Investment Co.* v. *United States*, 272 U. S. 564, and *Commercial Credit Company* v. *United States*, 276 U. S. 226. The question presented in this petition for the consideration of this Court is whether or not it is mandatory under Section 26 of the National Prohibition Act, Title 2 (Chapter 85, Act Oct. 28, 1919; 41 St. L. 305, 315; 27 U. S. C. A., Sec. 40) that an automobile used to unlawfully transport intoxicating liquor be seized and proceeded against under said statute, or may such an automobile be proceeded against and forfeited under Section 3450 of the Revised Statutes (26 U. S. C. A., Sec. 1181) for the deposit and concealment of intoxicating liquor with intent to defraud the United States Government of taxes due thereon.

Statutes Involved.

National Prohibition Act, Title II, Sec. 26, Chap. 85, Act Oct. 28, 1919; 41 St. L. 305, 315; 27 U. S. C. A., Sec. 40.

> Sec. 26. When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the per-

son arrested under the provisions of this chapter in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise, at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the adver-

tisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

R. S., Sec. 3450, 26 U. S. C. A., Secs. 1181, 1182:

SEC. 3450. REMOVING AND CONCEALING ARTICLES WITH INTENT TO DEFRAUD UNITED STATES OF TAX—FORFEITURE AND PENALTY. Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited. And every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than five hundred dollars. And all boilers, stills, or other vessels, tools and implements, used in distilling or rectifying and forfeited under any of the provisions of this Title, and all condemned material, together with any engine or other machinery connected therewith, and all empty barrels, and

all grain or other material, suitable for distillation, shall, under the direction of the court in which the forfeiture is recovered be sold at public auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of according to law. And all spirits or spiritous liquors, which may be forfeited under the provisions of this Title, unless herein otherwise provided, shall be disposed of by the Commissioner of Internal Revenue as the Secretary of the Treasury may direct.

Facts.

The facts relative to the seizure of the automobile in question are given in Paragraphs II, IV and V of the findings of fact and conclusions of law by the District Court (R. 26 and R. 27) and read as follows:

II.

That on or about the 27th day of September, 1928, in the City of Fresno, County of Fresno, and within the Northern Division of the Southern District of California, the said Paul L. Mathias, acting on behalf of and for the said Commissioner of Prohibition of the United States, seized a certain Willys-Knight Roadster automobile, Engine No. 27-260, being the same automobile as is the respondent in the above named libel;

IV.

That the facts of the seizure are as follows: That on the evening of September 27, 1928, Agent Paul L. Mathias stationed himself in the rear of the Sequoia Hotel in the City of Fresno, State of California, and there saw one Hans P. Mortensen, alias H. P. Bender, in the act of removing Five (5) Pints of

Mexican Smuggled Whiskey, bearing the label "Border Bell Bourbon Whiskey, etc.", from the said respondent automobile; that the said Mortensen had deposited and concealed the said smuggled whiskey in the respondent automobile with the intent to defraud the United States Government of the taxes due thereon; in violation of the provisions of Section 3450 Revised Statutes; *that at the time of the arrest, the respondent vehicle was being used by said Mortensen for the purpose of transporting the liquor seized therein.* (Italics ours.)

V.

That on the 3rd day of October, 1928, the said Paul L. Mathias swore out a complaint before Samuel F. Hollins, United States Commissioner at Fresno, California, in which he charged that the said Hans P. Mortensen, alias H. P. Bender, did, on the 27th day of September, 1928, *unlawfully possess and transport* Twelve (12) one-pint bottles of intoxicating liquor; that on the 19th day of November, 1928, an Information was filed charging the said Hans P. Mortensen with violation of Section 3450 Revised Statutes; that on the 21st day of November, 1928, the said Hans P. Mortensen was arraigned upon said charge and pleaded guilty to violating the criminal provisions of Section 3450 Revised Statutes, and was fined in the sum of Two Hundred Fifty Dollars ($250.00) for the violation thereof. (Italics ours.)

It is found by the District Court upon stipulation of fact that your petitioner, Davies Motors, Inc., is an innocent lienor of the automobile in question, under conditional sale contract for an amount of $896.00.

On September 27, 1928, the said automobile was seized by the prohibition agent Mathias, and on October 3, 1928 an affidavit of complaint (Exhibit A, R. 18) was filed by the said prohibition agent Mathias against one Mortensen, the driver of the automobile, for "willfully, wrongfully and unlawfully possessing and transporting twelve one-pint bottles of intoxicating liquor", and a warrant was issued for said offense by the United States Commissioner, and the said Mortensen was arrested under said warrant (See Exhibits B and C, R. 19 and R. 20). On November 19, 1928, an information was filed against the said Mortensen, charging him with violation of Section 3450 of the Revised Statutes, and on November 21, 1928, the said Mortensen was arraigned upon the said charge and pleaded guilty, and was fined $250. (See paragraphs V, Stipulation of Facts, R. 22). On January 2, 1929, a libel was filed against the said automobile, in which it was alleged that the said Mortensen, the driver, had concealed and deposited five pints of distilled spirits upon which there was then due certain taxes imposed by the Act of November 23, 1921, known as the Willis Campbell Act and the Revenue Act of 1921 (See Libel, Count I, R. 3-4). Your petitioner filed a complaint of intervention (R. 7) and respectfully showed that the said Mortensen at the time of his arrest and the confiscation of said automobile was transporting in said automobile five pints of intoxicating liquor in violation of the National Prohibition Act. The Court concluded as a matter of law that the said automobile should be forfeited for violation of Section 3450 of the Revised Statutes, (See Conclusions of Law, Paragraph I, R. 30), and entered a decree on June 20, 1929, ordering the said automobile to be condemned and forfeited to the United States. (See Decree, R. 30-31.)

Specifications of Error.

The assignments of error relied upon by your petitioner in the appeal to the Circuit Court, and which will be urged before this Court, were as follows (R. 35-36):

I.

That the Honorable Court erred in its conclusions of law, in that it concluded that the respondent automobile herein should be forfeited to the United States of America for a violation of the provisions of Section 3450 Revised Statutes.

II.

That the Honorable Court herein erred in that in its conclusions of law it concluded that the United States of America should recover from the intervener-claimant, Davies Motors, Inc., its costs of suit herein incurred and its storage and warehouse charges incurred since the date of seizure.

III.

That the Honorable Court erred in its decree entered herein in this, that said decree ordered, adjudged and decreed that the judgment be for the libelant and that the respondent automobile be declared forfeited to the libelant and that said libelant recover its costs of action for storage charges from the intervener and that said decree and all thereof was contrary to law and should have been rendered in favor of Davies Motors, Inc., the intervener, dismissing said libel and said respondent automobile, and ordering said respondent automobile released to the intervener free from all claim of the libelant.

The point involved in this case has been argued before this Court by the counsel for your petitioner in several other cases, but has not been decided. Members of this Court have said that the question still remains open because in the previous cases decided by this Court either the pleadings or the specific facts in the cases did not necessitate a decision on this specific question. Discussions of the question in the cases argued by counsel for your petitioner may be found in:

United States v. *One Ford Coupe*, 272 U. S. 321;
Port Gardner Investment Company v. *United States*, 272 U. S. 564;
Commercial Credit Company v. *United States*, 276 U. S. 226.

Conflict With Decisions of Other Circuit Courts.

1. The decision by the Ninth Circuit Court of Appeals in this case is in harmony with the decision of the United States Circuit Court of Appeals for the Fourth Circuit in *Richbourg Motor Company* v. *United States*, 34 Fed. (2) 38, but is in conflict with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in *United States* v. *General Motors Acceptance Corporation*, 25 Fed. (2) 238, and of the United States Circuit Court of Appeals for the Second Circuit in *Commercial Credit Corporation* v. *United States*, 18 Fed. (2) 927. The point upon which these circuits are in conflict is whether or not the provisions of Section 26 of the National Prohibition Act are mandatory in requiring forfeiture proceedings to be brought under the provisions of that act against an automobile used to transport intoxicating liquor, or whether

the United States District Attorneys may elect to proceed against such automobiles under Section 3450 of the Revised Statutes for the deposit and concealment of intoxicating liquor with intent to defraud the United States of a tax thereon. The Fourth and the Ninth Circuits have both decided that the Government may elect to proceed under Section 3450 Revised Statutes without regard to the provisions of Section 26 of the National Prohibition Act. The Second Circuit Court of Appeals, in speaking of Section 3450 and Section 26, said:

> "In these circumstances, we believe there is a direct conflict between the two sections in question, and that Section 26 must control the disposition of the vehicle."
>
> (*Commercial Credit Corp.* v. *United States*, 18 Fed. (2) 927, at p. 930.)

and the Fifth Circuit Court of Appeals said:

> "Under such circumstances it is apparently recognized in United States *v.* One Ford Coupe, 272 U. S. 321, that Section 26 is exclusively applicable."
>
> (*United States* v. *General Motors Acceptance Corporation*, 25 Fed. (2) 238, at 239.)

The District Courts throughout the United States are in hopeless conflict as to the law applicable under the circumstances.

Importance of Case and Necessity for Granting Writ.

1. This Court has recognized the importance of the law involved in this case, as it has granted petitions filed by counsel for your petitioner in similar cases, and has re-

cently, December 2, 1929, granted a writ of certiorari to the Fourth Circuit Court of Appeals in *Richbourg Motor Company* v. *United States,* involving similar specifications of error. (See U. S. Supreme Court Advance Opinions, 1929 Term, p. 130.) The pleadings in this case present even more clearly than does the *Richbourg Motor* case the question to be decided by this Court.

The answer of your petitioner to the libel in this case specifically raises the question in paragraphs 7 and 8 of the complaint in intervention (See Record 9 and 10).

It is respectfully urged that writ of certiorari should be immediately granted in this case, so that it might be heard at the same time or previous to a consideration of the *Richbourg Motor* case now before this Court.

2. This Court appreciates the great loss of money and inconvenience being caused to the automobile industry and the great annoyance being caused to the Government because of the confusion that exists in the various District and Circuit Courts respecting the law applicable, and it is respectfully urged that this Court grant this petition in order to clarify the law on the subject.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of this Court, directed to the Circuit Court of Appeals for the Ninth Circuit, to the end that this case may be reviewed and determined by this Court, and that the judgment of the Circuit Court of Appeals in this case may be reviewed and reversed; and that your petitioner may have such other and further relief and

remedy in the premises as to this Court may seem appropriate and just, and thus your petitioner will ever pray.

DAVIES MOTORS INC.

By DUANE R. DILLS,
Counsel for the Petitioner.

DEFORREST HOME,
CHARLES W. HASWELL,
Of Counsel.

I certify that in my opinion the foregoing petition is well founded in point of law. It is not filed for delay.

DUANE R. DILLS.

January, 1930.

BRIEF IN SUPPORT OF PETITION.

Opinion Below.

No opinion other than the findings of fact and conclusions of law, which may be found in the record, pages 25-30, was rendered by the United States District Court, Southern District of California, Northern Division. The opinion of the United States Circuit Court of Appeals for the Ninth Circuit in this case may also be found in the record (R. S. Z.), since the said decision has not yet been reported in the published law reports, or the said decision may also be found in the United States Daily of December 11, 1929, page 6, IV U. S. Daily 2694.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Ninth Circuit was entered on November 12, 1929 (R. 61...). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of Feb. 13, 1925, 28 U. S. C. A., Sec. 347(a).

Argument.

It will serve no useful purpose to cite all the cases on the subject, as most of them have been referred to and were considered by this Court in its decisions in *United States* v. *One Ford Coupe,* 272 U. S. 321; *Port Gardner Investment Company* v. *United States,* 272 U. S. 564; *Commercial Credit Company* v. *United States,* 276 U. S. 226, and in the petition for writ of certiorari which was granted December 2, 1929, in *Richbourg Motor Company* v. *United States,*

United States Supreme Court Advance Opinions, 1929 Term, page 130.

If a writ of certiorari should be granted in this case, your petitioner will then immediately move to have it considered at or before the time the *Richbourg* case is heard, so that this Court may dispose of the question at the same time.

It is respectfully submitted that the relief prayed for by the petitioner in this case should be granted and a writ of certiorari issued, directed to the Ninth Circuit Court of Appeals, so that the matter might finally be determined by this Court.

DUANE R. DILLS,
Counsel for Petitioner.

DEFORREST HOME,
CHARLES W. HASWELL,
Of Counsel.

FILE COPY

To be argued by
DUANE R. DILLS.

FIL
APR 1
CHARLES ELMO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929

No. 569.

DAVIES MOTORS, INC., *Petitioner,*

v.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR PETITIONER.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

DAVIES MOTORS, INC., Petitioner, *vs.* THE UNITED STATES OF AMERICA.	No. 569.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONER.

Decision Below.

The decision of the United States Circuit Court of Appeals in this case is reported—*Davies Motors, Inc.* (*a corporation*) v. *United States of America,* 35 Fed. (2d) 928. The decision of the United States District Court is not reported, but may be found in the record (R. 26-31).

Question at Issue.

This case brings up for decision by the United States Supreme Court the question which was expressly left open in *United States* v. *One Ford Coupe,* 272 U. S. 321; *Port Gardner Investment Co.* v. *United States,* 272 U. S. 564, and *Commercial Credit Company* v. *United States,* 276 U. S. 226. The question presented is whether or not it is mandatory under Section 26 of the National Prohibition Act, Title 2 (Chapter 85, Act Oct. 28, 1919; 41 St. L. 305, 315;

27 U. S. C. A., Sec. 40) that an automobile used to unlawfully transport intoxicating beverage liquor be seized and proceeded against under said statute, and under which statute the rights of innocent lienors are protected, or may such an automobile be proceeded against and forfeited under Section 3450 of the Revised Statutes (26 U. S. C. A., Sec. 1181) for the deposit and concealment of intoxicating liquor with intent to defraud the United States Government of taxes due thereon, and under which statute the rights of innocent lienors are disregarded and absolutely forfeited.

The first assignment of error in the appeal to the Circuit Court, and which is the first assignment of error included in the specifications of error before this court, is sufficiently broad to justify a review of the other points considered but not decided, and upon which this court sharply divided in *United States* v. *One Ford Coupe*, 272 U. S. 321, if this court feels disposed to reconsider those questions.

Statutes Involved.

National Prohibition Act, Title II, Sec. 26, Chap. 85, Act Oct. 28, 1919; 41 St. L. 305, 315; 27 U. S. C. A., Sec. 40.

> "Sec. 26. When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or auto-

mobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this chapter in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise, at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week

for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts."

R. S., Sec. 3450, 26 U. S. C. A., Secs. 1181, 1182:

"SEC. 3450. REMOVING AND CONCEALING ARTICLES WITH INTENT TO DEFRAUD UNITED STATES OF TAX—FORFEITURE AND PENALTY. Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited. And every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than five hundred dollars. And all boilers, stills, or other vessels, tools and implements, used in distilling or rectifying and forfeited under

any of the provisions of this Title, and all condemned material, together with any engine or other machinery connected therewith, and all empty barrels, and all grain or other material, suitable for distillation, shall, under the direction of the court in which the forfeiture is recovered be sold at public auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of according to law. And all spirits or spiritous liquors, which may be forfeited under the provisions of this Title, unless herein otherwise provided, shall be disposed of by the Commissioner of Internal Revenue as the Secretary of the Treasury may direct."

Other Pertinent Statutes.

41 Stat. L. 305, 317, 27 U. S. C. A. 52.

SEC. 35. All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax stamps for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person

from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

The commissioner, with the approval of the Secretary of the Treasury, may compromise any civil cause arising under this title before bringing action in court; and with the approval of the Attorney General he may compromise any such cause after action thereon has been commenced.

SUPPLEMENTAL ACT OF 1921.

Chap. 34, Act Nov. 23, 1921, 42 Stat. L. 222, 223, 27 U. S. C. A. 3, 53, 54, sometimes called the Willis Campbell Act.

SEC. 5. That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. All taxes and tax penalties provided for in section 35 of Title II of the National Prohibition Act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor.

If distilled spirits upon which the internal revenue tax has not been paid are lost by theft, accidental fire, or other casualty while in possession of a common carrier subject to the Transportation Act of 1920 or the Merchant Marine Act, 1920, or if lost by theft from a distillery or other bonded warehouse, and it shall be made to appear to the

commissioner that such losses did not occur as the result of negligence, connivance, collusion, or fraud on the part of the owner or person legally accountable for such distilled spirits, no tax shall be assessed or collected upon the distilled spirits so lost, nor shall any tax penalty be imposed or collected by reason of such loss, but the exemption from the tax and penalty shall only be allowed to the extent that the claimant is not indemnified against or recompensed for such loss. This provision shall apply to any claim for taxes or tax penalties that may have accrued since the passage of the National Prohibition Act or that may accrue hereafter. Nothing in this section shall be construed as in any manner limiting or restricting the provisions of Title III of the National Prohibition Act."

Statement.

The facts relative to the seizure of the automobile in question are given in the findings of fact and conclusions of law of the District Court (R. 26-30), and are as follows:

"I.

That on or about the 27th day of September, 1928, Paul L. Mathias was and is a duly authorized and Acting Agent of the Commissioner of Prohibition of the United States;

II.

That on or about the 27th day of September, 1928, in the City of Fresno, County of Fresno, and within the Northern Division of the Southern District of California, the said Paul L. Mathias, acting on behalf of and for the said Commissioner of Prohibition of the United States, seized a certain Willys-Knight Roadster automobile, Engine No. 27-260, being the

same automobile as is the respondent in the above named libel;

III.

That at the time the said respondent automobile was seized, as aforesaid, there was concealed and deposited therein, certain goods, merchandise and commodities, to-wit: Five (5) Pints of distilled spirits; that the said distilled spirits were fit for beverage purposes and then and there contained more than one-half of one per cent of alcohol by volume; that there was due upon the said Five (5) pints of distilled spirits, certain taxes imposed by the Act of November 23, 1921, known as the Willis-Campbell Act, and by the Revenue Act of 1921; that at the time when the said distilled spirits were concealed and deposited in the said automobile, as aforesaid, the taxes due thereon were unpaid and still remain unpaid; that there were no marks, stamps or labels on the said bottles of said distilled spirits to indicate that said taxes due thereon had been paid;

IV.

That the facts of the seizure are as follows: That on the evening of September 27, 1928, Agent Paul L. Mathias stationed himself in the rear of the Sequoia Hotel in the City of Fresno, State of California, and there saw one Hans P. Mortensen, alias H. P. Bender, in the act of removing Five (5) Pints of Mexican Smuggled Whiskey, bearing the label "Border Bell Bourbon Whiskey, etc.", from the said respondent automobile; that the said Mortensen had deposited and concealed the said smuggled whiskey in the respondent automobile with the intent to defraud the United States Government of the taxes due thereon; in violation of the provisions of Section 3450 Revised Statutes; that at the time of the arrest, the respondent vehicle was being used by said

Mortensen for the purpose of transporting the liquor seized therein;

V.

That on the 3rd day of October, 1928, the said Paul L. Mathias swore out a complaint before Samuel F. Hollins, United States Commissioner at Fresno, California, in which he charged that the said Hans P. Mortensen, alias H. P. Bender, did, on the 27th day of September, 1928, unlawfully possess and transport Twelve (12) one pint bottles of intoxicating liquor; that on the 19th day of November, 1928, an Information was filed charging the said Hans P. Mortensen with violation of Section 3450 Revised Statutes; that on the 21st day of November, 1928, the said Hans P. Mortensen was arraigned upon said charge and pleaded guilty to violating the criminal provisions of Section 3450 Revised Statutes, and was fined in the sum of Two Hundred Fifty Dollars ($250.00) for the violation thereof;

VI.

That the Davies Motors, Inc., is a corporation, organized and existing under and by virtue of the State of California, and authorized to do business and is doing business as a dealer in Willys-Knight automobiles, in the City of San Diego, State of California;

VII.

That on the 3rd day of May, 1927, Mrs. H. P. Mortensen purchased from said corporation a Willys-Knight automobile under a conditional contract of sale, pursuant to which said corporation retained the title thereof until the purchase price should have been fully paid; that at the time of said sale, said corporation, in accordance with its custom, required and secured a credit statement from said purchaser in

which said purchaser alleged that H. P. Mortensen, her husband hereinabove mentioned, was engaged in the interior decorating business on his own account and had been so engaged for a period of eight years; that as assets said purchaser listed a house and lot in Omaha, Nebraska, of the then value of Eight Thousand Dollars ($8,000.00) and also gave two references, both of which said corporation investigated and found satisfactory; that said purchaser made the payments on said car regularly and on the due date, and on June 22, 1928, at the solicitation of one of the said corporation's salesmen, said purchaser traded in the Willys-Knight automobile purchased on May 3, 1927, and purchased the Willys-Knight Roadster, engine #27-260, referred to above, on conditional sales contract under and pursuant to the terms of which said corporation retained the title thereto until all payments should have been completed; that the sale price of the said Willys-Knight Roadster purchased on June 22, 1928, was Thirteen Hundred Ninety-Five ($1395.00) Dollars; that under the sale contract entered into between the purchaser and the said Davies Motors, Inc., the purchaser was required to make payments in the sum of Fifty-Seven Dollars ($57.00) per month, commencing on July 22, 1928; that the net balance due on the said July 22, 1928, after allowing deductions for the trade in value for another car was Eight Hundred Ninety-Six Dollars ($896.00); that the payment due on July 22, 1928, was not paid and that the claimant herein ascertained that the purchaser and her husband, H. P. Mortensen, had moved to Fresno, California, and thereupon demand was made upon the purchaser, and part of the said Fifty-Seven Dollars ($57.00) was paid on August 6, and the balance thereof on August 7, 1928;

VIII.

That Davies Motors, Inc., Claimant herein, had no notice that said automobile was being used for illegal purposes, as charged in this Libel, or otherwise, and knew of no facts or circumstances which would reasonably or otherwise lead them to believe that the automobile was being so used; that the Davies Motors, Inc., is now and at all times mentioned, the legal owner of said Willys-Knight automobile; that no payments have been made under and pursuant to the aforementioned conditional sale contract since the 7th day of August, 1928, and that the said Davies Motors, Inc., is under and pursuant to the terms thereof entitled to the immediate and exclusive possession of said automobile and to all legal and equitable rights therein as the exclusive owner thereof.

FROM THE FOREGOING FACTS THE COURT FINDS AS CONCLUSIONS OF LAW:

I.

That the above named vehicle should be forfeited to the United States of America for violation of the provisions of Section 3450 Revised Statutes:

That the Libelant, United States of America, should recover from the Intervenor and Claimant, Davies Motors, Inc. its costs of suit and the storage and warehouse charges properly incurred since the date of seizure."

It was stipulated by counsel when the case was before the Circuit Court of Appeals that the word "smuggled" should be stricken from the record with the same effect as if that word had been omitted entirely, so that whenever the term "Mexican smuggled whiskey" appears, it should read instead "Mexican whiskey", as no question was raised at the time with reference to smuggling the liquor into the United States (R. 49-50).

On September 27, 1928, the said automobile (Willys-Knight Roadster, Engine No. 27-260) was seized by a prohibition agent named Mathias. It was stipulated that Mortensen, the operator of the automobile, would have testified that he drove the automobile to the back of the Sequoia Hotel, just prior to its seizure with the liquor found therein, and it was stipulated that Mathias, the prohibition agent, would have testified that when he arrived at the rear of the hotel to make the seizure, the automobile was standing still, and at the time when the seizure was actually made, it was not in motion (R. 22). On October 3, 1928, an affidavit of complaint (Exhibit A, R. 18) was filed by Mathias, prohibition agent, against the said Mortensen, the driver of the automobile, for wrongfully and unlawfully possessing and transporting the intoxicating liquor in violation of the Act of October 28, 1919. A warrant was issued against the said Mortensen on October 3, 1928, upon said complaint, in which the said Mortensen was charged with possessing and transporting intoxicating liquor (Exhibit B, R. 19). On October 5, 1928, the said Mortensen was arrested under said warrant and produced before the United States Commissioner (Exhibit C, R. 20). On November 19, 1928, an information was filed against the said Mortensen, charging him with violation of Section 3450 Revised Statutes, and on November 21, 1928, he was arraigned upon said charge and pleaded guilty, and was fined $250.00 (See Paragraph V, Stipulation of Facts, R. 22-23). On January 2, 1929, a libel was filed against the said automobile, in which it was alleged that the said Mortensen, the driver of the automobile, had concealed and deposited the intoxicating liquor, with intent to defraud the United States of the taxes due and imposed thereon by the Act of November 23, 1921,

known as the Willis-Campbell Act of 1921, and which taxes had not been paid (See Count I of the Libel, R. 3-4). The libel also contained a second count, charging that the automobile had been used to smuggle liquor into the United States (Count II of the Libel, R. 5), but this count was not raised at the trial (See Stipulation, R. 49-50). On January 22, 1929, a complaint in intervention was filed by the Davies Motors, Inc., petitioner herein (R. 7-12), in which were alleged the facts concerning the purchase of the automobile and the title of the petitioner therein, and the innocence of the petitioner with respect to a violation of the prohibition or the revenue laws, and raising the issue that at the time of the arrest and confiscation the said Mortensen was transporting in the said automobile the intoxicating liquor, and that the said Mortensen had been arrested upon a warrant and taken into custody for transporting the intoxicating liquor contrary to the Act of October 28, 1919 (See Paragraphs 8, 9 and 10 of the Complaint in Intervention, R. 10-11). Attached to said complaint in intervention was a copy of the conditional sale contract under which Mrs. H. P. Mortensen had purchased the automobile from Davies Motors, Inc., petitioner herein (R. 12), and in which it was provided in the fourteenth paragraph thereof that the automobile should not be used for the transportation of intoxicating liquor or used in or to the violation of any laws of the United States; that any violation of such provision would forthwith terminate the contract, and all the rights of the purchaser therein should thereupon be immediately forfeited, and that the petitioner herein would thereupon be alone and solely entitled to the possession of the automobile (R. 16).

The case was submitted to the United States District Judge for the Southern District of California for decision on a stipulation of facts (R. 20-25), and upon which the District Court made its findings of fact and conclusions of law hereinbefore set forth.

Specifications of Error.

The assignment of errors relied upon by your petitioner in the appeal to the Circuit Court, and which are urged before this court, are as follows (R. 35-36):

"I.

That the Honorable Court erred in its conclusions of law, in that it concluded that the respondent automobile herein should be forfeited to the United States of America for a violation of the provisions of Section 3450 Revised Statutes.

II.

That the Honorable Court herein erred in that in its conclusions of law it concluded that the United States of America should recover from the intervener-claimant, Davies Motors, Inc., its costs of suit herein incurred and its storage and warehouse charges incurred since the date of seizure.

III.

That the Honorable Court erred in its decree entered herein in this, that said decree ordered, adjudged and decreed that the judgment be for the libelant and that the respondent automobile be declared forfeited to the libelant and that said libelant recover its costs of action for storage charges

from the intervener and that said decree and all thereof was contrary to law and should have been rendered in favor of Davies Motors, Inc., the intervener, dismissing said libel and said respondent automobile, and ordering said respondent automobile released to the intervener free from all claim of the libelant."

Preliminary Statement.

Very little, if anything, of substance can be added to the arguments which counsel for this petitioner urged when he appeared before this court as counsel in the cases of:

United States v. *One Ford Coupe,* 272 United States 321;

Port Gardner Investment Co. v. *United States,* 272 U. S. 564;

Commercial Credit Company v. *United States,* 276 U. S. 226.

The arguments pro and con are reviewed exhaustively in the majority opinion written by Mr. Justice Brandeis and in the dissenting opinion written by Mr. Justice Butler, in *United States* v. *One Ford Coupe.* All opinions of the various District and Circuit Courts, as well as of the Supreme Court, decided up to that time, are fully and chronologically referred to and discussed in both the majority and dissenting opinions in that case.

The confusing decisions in the District and Circuit Courts since the decision of the United States Supreme Court in the cases above referred to seem to be largely dependent upon whether or not the judges in those cases are sympathetic with the point of view expressed by Mr.

Justice Brandeis, or with the point of view expressed by Mr. Justice Butler. The Second and the Fifth Circuits refer to the dissenting opinion of Mr. Justice Butler, and make his views the law in those circuits.

See

United States v. *General Motors Acceptance Corporation* (C. C. A. 5), 25 Fed. (2d) 238;
Commercial Credit Corporation v. *United States* (C. C. A. 2), 18 Fed. (2d) 927.

The Fourth Circuit endorses the view of Mr. Justice Brandeis.

See

General Motors Acceptance Corporation v. *United States* (C. C. A. 4), 23 Fed. (2d) 799;
United States v. *Commercial Credit Company* (C. C. A. 4), 20 Fed. (2d) 519;
Richbourg Motor Company v. *United States* (C. C. A. 4), 34 Fed. (2d) 38, which is now case No. 452 before this court.

The Ninth Circuit, since the decision of the United States Supreme Court in *United States* v. *One Ford Coupe,* has followed the views of Mr. Justice Brandeis. The present views of that court are expressed in *Davies Motors, Inc.* v. *United States,* Case No. 569, now at bar. That circuit has drawn fine distinctions in cases it has considered since the decision of the Supreme Court in *Commercial Credit Company* v. *United States,* reversing that circuit.

See

United States v. *One Studebaker*, 32 Fed. (2d) 866;

Commercial Credit Company v. *United States*, 33 Fed. (2d) 228.

Prior to the decisions of the United States Supreme Court, however, that circuit had expressed views in sympathy with those of Mr. Justice Butler.

See

McDowell v. *United States* (C. C. A. 9), 286 Fed. 521;

Studebaker v. *United States* (C. C. A. 9), 289 Fed. 256.

Confusion as to the applicable law continues throughout the District Courts, in all of which such cases are blocking the calendars. The automobile dealers are anxious to know their rights and remedies; the manufacturers seek guidance; and the finance companies, banks and bankers are desirous of ascertaining the legal risks involved. It is hoped, therefore, that this case will give this court the opportunity to clearly state the law.

ARGUMENT.

I.

Proceedings under Section 26 of the National Prohibition Act were mandatory.

The District Court found as a fact that there was both transportation of intoxicating liquor in violation of the National Prohibition Act, and concealment of the liquor with intent to defraud the United States of a tax thereon in violation of Section 3450. The finding was as follows:

> "* * * that the said Mortensen had deposited and concealed the said smuggled whiskey in the respondent automobile with the intent to defraud the United States Government of the taxes due thereon; in violation of the provisions of Section 3450 Revised Statutes; that at the time of the arrest, the respondent vehicle was being used by the said Mortensen for the purpose of transporting the liquor seized therein" (Finding of Fact, Paragraph IV, R. 27).

This court and the Circuit Courts of Appeal should not review findings of fact by the District Court.

See

N. Y., L. E. & W. R. R. Co. v. *Winter's Admtr.*, 143 U. S. 60;

Aetna Life Insurance Company v. *Ward*, 140 U. S. 76;

Wilson v. *Everett*, 139 U. S. 616.

Furthermore, since no objection was taken in the court below to the finding of fact by the government, it will not be considered in the Supreme Court.

See

Clark v. *Fredericks*, 105 U. S. 4;
Springer v. *United States*, 102 U. S. 586;
Wilson v. *McNamee*, 102 U. S. 572.

That finding, moreover, is justified by the stipulation of fact in the case, which reads as follows:

> "* * * It is stipulated that Hans P. Mortensen would testify that on the night in question, just prior to the seizure, he drove up to the back of the Sequoia Hotel in the respondent automobile in which liquor was found; it is further stipulated, however, that Paul L. Mathias, prohibition agent, would testify that when he arrived at the rear of the hotel to make the seizure, the Willys-Knight automobile was standing still, and at the time when the seizure was actually made it was not in motion" (Stipulation, Paragraph IV, R. 22).

The stipulation with reference to the seizure itself reads as follows:

> "* * * That on the evening of September 27, 1928, Agent Paul L. Mathias stationed himself in the rear of the Sequoia Hotel in the City of Fresno, State of California, and there saw one Hans P. Mortensen, alias H. P. Bender, in the act of removing five pints of Mexican smuggled whiskey bearing the label "Border Bell Bourbon Whiskey, etc." from the said respondent automobile" (Stipulation, Paragraph IV, R. 22).

In other words, the agent did not see any act of concealing, but on the contrary saw an act of exposing. Since Mortensen was removing the liquor from the autobile, and an automobile is a vehicle generally used for

transportation, it was proper for the agent to conclude that he had discovered Mortensen in possessing the liquor incident to transportation. That this was his conclusion is borne out by the fact that he then and there seized the automobile for violation of the National Prohibition Act, and later, on October 3rd, he made an affidavit of complaint against Mortensen for unlawfully possessing and transporting the liquor (Exhibit A, R. 18), and had a warrant issued against him for such offense (Exhibit B, R. 19). As a matter of law, the prohibition agent, Mathias, was justified in considering that he had "discovered" Mortensen possessing intoxicating liquor incidental to transportation. This court, by Mr. Chief Justice Taft, has held with respect to the language used in Section 26 of the National Prohibition Act as follows:

> "The language of the section provides for seizure when an officer of the law 'discovers' anyone in the act of transporting the liquor by automobile or other vehicle. Certainly it is a very narrow and technical construction of this word which would limit it to what the officer sees, hears and smells as an automobile rolls by, and exclude therefrom, when he identifies the car, the convincing information that he may previously have received as to the use being made of it." (*Carroll* v. *U. S.*, 267 U. S. 132, at 158.)

And in *United States* v. *One Buick Coach Automobile,* 34 Fed. (2d) 318, at 320, the District Court for the Northern District of Indiana says, with respect to this section of the law:

> "The argument that the agents did not see the automobile containing the liquor while it was in motion, and therefore did not discover the act of transportation, is extremely technical.

> "'Discover,' according to Webster's New International Dictionary, means to lay open to view; to reveal; to make known of, as of a thing existing already, but not perceived or known; to find out; to ascertain; to espy; to detect. Transportation was revealed to them when they found Cowan with the liquor and automobile under the circumstances heretofore described. They certainly found out and ascertained that Cowan had used and was using the automobile to transport liquor unlawfully. They in very truth espied and detected him in such juxtaposition to the liquor and car that they could infer nothing else than that he transported the liquor in the car."

Since there was transportation and the District Court so found, it follows that if the language of Section 26 of the National Prohibition Act is mandatory, the forfeiture proceedings should have been under that statute, wherein the innocent lienor could have asserted his rights. Throughout that statute, the imperative word "shall" instead of the permissive word "may" is used. Even though the word "may" had been used, it would have followed as a matter of law that the Government nevertheless would have been required to proceed under that statute because the innocent rights of third parties are involved. With respect to the use of such words, this court has held, in *Mason* v. *Fearson*, 50 U. S. 248, at 259 (9 Howard), as follows:

> "The form of expression adopted here, it must be remembered, is employed in laws, and not contracts, and of course, if a well established construction had been before given to it in laws by the courts under certain circumstances, it must be presumed to have been well known, and intended here under like circumstances. What are these circumstances?

Whenever it is provided that a corporation or officer 'may' act in a certain way, or it 'shall be lawful' for them to act in a certain way, it may be insisted on as a duty for them to act so, if the matter, as here, is devolved on a public officer, and relates to the public or third persons.

"Thus, in Rex & Regina *v.* Barlow, 2 Salkeid, 609, 'Where a statute directs the doing of a thing for the sake of justice or the public good, the word "may" is the same as the word "shall"; thus, 23 Hen. 6 says the sheriff *may* take bail; this is construed he *shall*, for he is compellable so to do.' Carthew, 293.

"On this, see further The King *v.* The Inhabitants of Derby, Skinner, 370; Backwell's cases, 1 Vernon, 152-154; 2 Chitty, 251; Dwarris on Stat. 712; Newburgh T. Co. *v.* Miller, 5 Johns. Ch. 113; City of New York *v.* Furze, 3 Hill, 612, 614; Minor *et al v.* The Mechanics' Bank, 1 Peters, 64. Without going into more details, these cases fully sustain the doctrine, that what a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds he ought to do. The power is conferred for their benefit, not his; and the intent of the legislature, which is the test in these cases, seems under such circumstances to have been 'to impose a positive and absolute duty'. But, under other circumstances, where the act to be done affects no third persons, and is not clearly beneficial to them or the public, the words 'may' do an act, or it is 'lawful' to do it, do not mean 'must', but rather indicate an intent in the legislature to confer a discretionary power. Malcolm *v.* Rogers, 5 Cowen, 88; 1 Peters, 64; 5 Johns. Ch. 113."

And in *Ralston* v. *Crittenden,* 13 Fed. 508, the Circuit Court holds as follows:

> "In substance it is claimed that in so far as the rights of complainants are concerned the state officers were at liberty to disregard the act. In this view I do not concur. Even if the terms of the statute were permissive only, and meant no more than the words generally employed in statutes importing a grant of authority or power to a public officer to do a certain act, still it is well settled that all such acts are to be construed as mandatory, whenever the public interests *or individual rights* call for the exercise of the power conferred. Sup'rs. *v.* U. S., 4 Wall. 435; Galena *v.* Amy, 5 Wall. 705; McDougall *v.* Peterson, 11 C. B. 755; 15 Op. Atty. Gen. U. S. 621." (Italics are those of the court and not ours.)

In the arguments before this court in the *Ford Coupe, Port Gardner Investment Company,* and the *Commercial Credit Company cases,* the Solicitor General urged that the word "shall" in Section 26 should be construed as "may", citing cases such as *Railroad Company* v. *Hecht,* 95 U. S. 168, in support of that argument. It is true in such cases where the rights of innocent parties or the public were not involved, that the word "shall" is construed as "may", for the reasons set forth in *Mason* v. *Fearson, supra;* but where the rights of third parties or the public are involved, the converse is true, as we have seen by that case that "may" would be construed as "shall". However, it is unnecessary to examine those cases at length, because there is a clearer illustration of the mandatory effect of the word "shall" in Section 3450 itself. It is because of the mandatory feature of that statute that this court has given full effect to the forfeitures provided for therein, although the forfeitures against innocent parties were harsh and unjust. If the word "shall" in that statute could have been construed as "may" it is apparent from the expressions in the

opinions of this court that forfeitures of the property of innocent parties would not have been enforced in *Dobbin's Distillery* vs. *United States,* 96 U. S. 395; *Henderson Distilled Spirits,* 14 Wall. 44, 81 U. S. 44; *Goldsmith-Grant Co.* vs. *United States,* 254 U. S. 505, and the other cases of like effect.

With respect to Section 26 of the National Prohibition Act, counsel in the case at bar quotes as follows from the briefs filed by him when he was counsel before this court in the *Ford Coupe, Port Gardner Investment Company* and the *Commercial Credit Company* cases:

> "The provisions of that section are specific and mandatory, and require—
>
> (a) That the officer upon seizing the intoxicating liquor transported or illegally possessed shall—
>
> 1. Take possession of the automobile.
>
> 2. Arrest the person in charge thereof.
>
> 3. Proceed against the person arrested under the provisions of the National Prohibition Act.
>
> (b) The court, upon conviction of the person, shall—
>
> 1. Order the liquor destroyed.
>
> 2. Order the public sale of the automobile, unless good cause to the contrary is shown by the owner thereof.
>
> (c) The officer carrying out the execution of the court shall—
>
> 1. After deducting certain expenses provided for in the statute, pay all liens according to their priority, which shall be established by intervention or otherwise; and further that

> all liens against the property sold shall be transferred from the property to the proceeds of sale."

This court has held in the *Port Gardner Investment Company* case that after conviction for transportation of the individual, the mandatory language of Section 26 requires forfeiture proceedings under its provisions; and in the *Commercial Credit Company* case this court again held that where the individual was arrested and convicted of possession that nevertheless the mandatory features of Section 26 were applicable because the possession was incident to transportation. If the requirements of that section are compulsory in the event of conviction of the individual under the National Prohibition Act, they are equally compulsory whether or not the individual has been arrested or convicted. The language of the statute remains the same.

See *United States* v. *One Reo Truck* (C. C. A. 2), 9 Fed. (2d) 529, where the court says:

> "Now Revised Statutes Section 3450, at least as matter of logic, may still be in force as against the owner and mala fide lienors, but it cannot be in force against bona fide lienors when the offender has been convicted. That would result in a stark contradiction between the two statutes. Nor is it possible to say that it might be in force against bona fide lienors, when the offender is not convicted. The statute cannot mean different things at different times. If it does not cover such liens when the offender has been convicted, it does not cover them when he has not. It would be preposterous to say that the failure to convict an offender exposed the bona fide lienor to a penalty from which he would be exempt in case of conviction."

The following Circuit Courts have held that in view of the decisions of this court in the *Ford Coupe, Port Gardner Investment Company* and *Commercial Credit Company* cases, Section 26 is mandatory:

Commercial Credit Corporation vs. *United States*, 18 Fed. (2d) 927;
United States v. *General Motors Acceptance Corporation* (C. C. A. 5), 25 Fed. (2d) 238,

but the Fourth and Ninth Circuit Courts, on the other hand, have held in the cases at bar, No. 452 and No. 569, that in view of the decisions of this court in those cases, that the language is not mandatory.

Mr. Justice Brandeis, in the *Ford Coupe* case, expresses no opinion as to whether or not Section 26 is mandatory, but Mr. Justice Stone in his concurring opinion in the *Ford Coupe* case definitely states that the language is mandatory, for he there says:

> "In that case Section 26, it seems to me, plainly directs that the seizure shall be made and proceedings for forefeiture of the seized vehicle had under that section. In that event Section 26 saves the interests of the innocent owner or lienor from forfeiture required by Section 3450."

Mr. Justice Butler, in his dissenting opinion in the *Ford Coupe* case, in which he was joined by Mr. Justice McReynolds and Mr. Justice Sutherland, and again in his concurring opinion in the *Port Gardner Investment Company* case, in which he was joined by Mr. Justice Stone, upholds the mandatory feature of Section 26, for in the latter case he says:

> "The substance of that question is whether the prohibition officer discovering one in the act of trans-

portation, may disregard the plain and direct command of Section 26 to proceed against the vehicle as there directed."

It is submitted, therefore, that the law requires, justice compels and common sense dictates that the seizure should be under Section 26 of the National Prohibition Act instead of under Section 3450 of the Revised Statutes.

II.

It is not a question of election but of direction that requires forfeiture under Section 26 of the National Prohibition Act.

In the case of *Richbourg Motor Company* v. *United States* (Case No. 452 at bar) the Circuit Court of Appeals for the Fourth Circuit in its decision, 34 Fed. (2d) 38, considers the question entirely from the point of view as to whether an election of remedies had been made, and it refers to its previous decision in *United States* v. *Commercial Credit Company*, 20 Fed. (2d) 519, and *General Motors Acceptance Corporation* v. *United States*, 23 Fed. (2d) 799. In both of these cases, as well as the *Richbourg Motor Company* case, at bar, and particularly the case of *United States* v. *Commercial Credit Company*, where Circuit Judge Parker considers the question, there is a reasonable and convincing discussion showing that the United States attorney should not be bound by an election made by the prohibition officer in seizing the car. We accept that reasoning. Notwithstanding the fact that in the *Davies Motors* case, No. 569 at bar,—that the prohibition agent seized the car for violation of the National Prohibition Act, filed

an affidavit of complaint alleging violation of the prohibition law for the transportation of liquor, had Mortensen, the driver of the car, arrested and held before the commissioner on a warrant charging transportation in violation of the National Prohibition Act, nevertheless we do not base our case upon the technicality that such acts by the prohibition agent constituted such an election that in a proper case the District Attorney would thereby be precluded from proceeding under another statute, if that statute were applicable.

The Ninth Circuit, in the consideration of the *Davies Motors* case, No. 569 at bar, likewise cites Section 838 of the Revised Statutes (19 Stat. 241; 28 U. S. C. A. 486) and the decisions of the Supreme Court in the *Confiscation Cases*, 74 U. S. 454 (7 Wall.), to establish the point that in an election of remedies, the District Attorney cannot be precluded because of a supposed election previously made by the prohibition agent in seizing the car. That is not the point at issue. Section 838 of the Revised Statutes merely states the powers and duties of the District Attorney, when in a proper case the Internal Revenue Collector reports an offense to his office. That statute does not authorize or direct the District Attorney to ignore the mandates of Congress; it merely embraces his duties and authority in proper cases. This court, in the *Confiscation Cases*, 74 U. S. 454, at 457 (7 Wall.), in holding that prosecutions are exclusively within the jurisdiction of the District Attorney, makes an exception as to those cases wherein Congress provides otherwise. Mr. Justice Clifford there says:

> "Public prosecutions, until they come before the court to which they are returnable, are within the exclusive direction of the district attorney, and even

> after they are entered in court they are so far under his control that he may enter a *nolle prosequi* at any time before the jury is impanelled for the trial of the case, *except in cases where it is otherwise provided in some act of Congress.*" (Italics ours.)

It is not the act of the prohibition agent or the act of the United States attorney that makes the election under which statute forfeiture proceedings shall be brought. It is the enactment of Congress itself which makes the election. We do not contend that the District Attorney is precluded because of some election made by an agent in arresting or seizing the car, but we do maintain that the District Attorney has no more right than the prohibition agent to disregard the plain commands of Section 26 of the National Prohibition Act. It is not a question of election, but rather one of positive direction by Congressional enactment. As was said in *United States* v. *One Dodge Sedan* (*Commercial Investment Trust, Intervenor*), 21 Fed. (2d) 971, at 973:

> "I hold that where the circumstances appear by the evidence that there was an unlawful transportation in violation of the National Prohibition Act, the prosecuting officer is not permitted by mere caprice to drop from his prosecution the unlawful transportation so as to avoid the consequences of the forfeiture proceedings authorized by Section 26 of that act * * *."

and as Mr. Justice Butler says in his concurring opinion in *Port Gardner Investment Company* v. *United States*, *supra*:

> "I think he has no more right to ignore that command than he has to let the liquor and offender go. The law makes the election."

The holding of this court in *Commercial Credit Company* v. *United States, supra,* by Mr. Justice Sanford, would seem to support the same view.

III.

Section 3450 is in conflict with Section 26 of the National Prohibition Act, and therefore was not re-enacted by the Willis-Campbell Act.

It seems to be accepted by Mr. Justice Brandeis in the majority opinion and Mr. Justice Butler in the minority opinion in the *Ford Coupe* case that unless Section 3450 of the Revised Statutes was re-enacted by the Willis-Campbell Act (Supplementary Act of 1921, Chapter 34, Act of November 23, 1921, 42 Stat. L. 222-3) that Section 3450, Revised Statutes, must stand repealed under the doctrine of the case of *United States* v. *Yuginovich,* 256 U. S. 450. Section 5 of the Willis-Campbell Act, *supra,* re-enacted such previous statutes that were not in direct conflict with the National Prohibition Act, and in *United States* v. *Stafoff,* 260 U. S. 477, it was held that certain of the previous criminal statutes were revived by the adoption of the Willis-Campbell Act. But this court in the *Stafoff* case did not deal with Section 3450, and in *Brooks* v. *United States,* 260 U. S. 481, decided at the same time, this court expressly declined to determine whether the Willis-Campbell Act re-enacted the revenue laws generally.

Whether the provisions of Section 3450, Revised Statutes, authorizing the seizure of automobiles concealing liquor with the intent to defraud of a tax were re-enacted by the Willis-Campbell Act is dependent upon whether or not the provisions of Section 3450 of the Revised Statutes

are in conflict with the provisions of Section 26 of the National Prohibition Act. The Willis-Campbell Act re-enacted all laws "except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act". Mr. Justice Brandeis sets forth in his opinion in the *Ford Coupe* case his reasons for believing that Section 3450 of the Revised Statutes is not in conflict with Section 26 of the National Prohibition Act, but Mr. Justice Stone in his concurring opinion says:

> "but I cannot subscribe to those expressions in the opinion which seem to suggest that the two sections are not in direct conflict. In a case where there is transportation of liquor in a vehicle in violation of the National Prohibition Law, with intent to defraud the United States of a tax * * * it appears to me that the conflict in such a case is direct, and that Section 26 by its terms is controlling."

and Mr. Justice Butler in his dissenting opinion, in which he was joined by Mr. Justice McReynolds and Mr. Justice Sutherland, says:

> "There is direct conflict between Section 26 and Section 3450 in respect to the disposition of vehicles seized * * * and the decisions of the lower courts are overwhelmingly to the effect that Section 26 N. P. A. and R. S. 3450 are in direct conflict."

Mr. Justice Butler then proceeds to set forth his arguments in refutation of those advanced by Mr. Justice Brandeis, citing the authorities in support thereof.

Seemingly the Circuit and District Courts have difficulty in determining whether this court has definitely held the two statutes to be in conflict, in view of the close division of this court on the point, and the unqualified state-

ments of Mr. Justice Brandeis and Mr. Justice Butler on the two sides of the question, and the statement by Mr. Justice Stone in his concurring opinion wherein he does not say definitely that the majority support Mr. Justice Brandeis in holding that there is a conflict. His language is that he cannot subscribe to the expressions in the opinion "*which seem to suggest*" that the statutes are not in direct conflict.

The District and Circuit Courts which continue to hold that there is a direct conflict feel that they are not, by so doing, running counter to the decision of this court in the *Ford Coupe* case, because of this suggestion by Mr. Justice Stone in his concurring opinion. Apparently these courts consider that question remains open.

Before the decision in the *Ford Coupe* case by this court, it was generally held that the two sections were in conflict.

> "All the decisions of the lower courts are overwhelmingly to the effect that Section 26 of the National Prohibition Act and R. S. Section 3450 are in direct conflict. It is so held by the Circuit Courts of Appeal of the Second, Fifth, Sixth and Eighth Circuits, by the Court of Appeals of the District of Columbia, and the Ninth Circuit has certified the question here in Port Gardner Investment Company *v.* United States."
>
> (Mr. Justice Butler's dissenting opinion in *Ford Coupe* case.)

Since the decision in the *Ford Coupe* case by this court, the Second Circuit in *Commercial Credit Corporation* v. *United States* (C. C. A. 2d), 1927, 18 Fed. (2d) 927, has said, at page 29:

> "In the case at bar are present all the facts alluded to by Justice Brandeis as missing in the case

under consideration by him. Lamonica and Calabresse were discovered in the act of transporting liquor in violation of law. Forthwith, under Section 26, it became the duty of the officer to seize the liquor, to take possession of the vehicle, to arrest the persons in charge thereof, to proceed at once against them 'under the provisions of this title,' and to hold the vehicle (unless the owner should give bond) to abide the result of the trial of the persons arrested. All of these duties were fully performed except the last mentioned. That duty has been violated if it be assumed that the Prohibition Administrator ceased, on December 9, 1926, to hold the vehicle to await the outcome of the prosecution and thereafter held it under the provisions of section 3450. *In these circumstances, we believe there is a direct conflict between the two sections in question, and that section 26 must control the disposition of the vehicle.* This view was very clearly stated by Mr. Justice Stone in his concurring opinion in the Ford Coupe case. The same view is expressed by Mr. Justice Butler in his concurring opinion in Port Gardner Investment Co. case, *supra.*" (Italics ours.)

The Fifth Circuit Court of Appeals, from which the *Ford Coupe* case was appealed to this court, has again said in *United States* v. *General Motors Acceptance Corporation* (C. C. A. 5), 1928, 25 Fed. (2d) 238, at page 239:

"Assuming that it is possible to prove that one who uses a vehicle in the removal or for the deposit or concealment of untax-paid liquor has the necessary intent under section 3450 to defraud the United States of a tax which existing law neither requires nor permits to be paid, it is nevertheless true that, if a person be caught in the act of unlawfully transporting liquor in a vehicle, there is no authority of

law to proceed under section 3450, either to prosecute the person or to forfeit the vehicle. Under such circumstances it is apparently recognized in United States *v.* One Ford Coupe, *supra*, that section 26 is exclusively applicable. In that case it was said that there was no allegation that the automobile had been discovered or was being used in unlawful transportation, or that the driver had been prosecuted. Here there was proof or admission that the driver was discovered by the arresting officers in the act of illegal transportation of liquor in the automobile sought to be forfeited."

One of the most exhaustive and thorough decisions on the question, which was handed down before the decision of this court in the *Ford Coupe* case, was that of the Sixth Circuit in *Commercial Credit Company* v. *United States* (C. C. A. 6) 1925, 5 Fed. (2d) 1, where the court says, at pages 4, 5 and 6:

> "Thus the Lewis case ceases to be continuing authority, but the question whether there is direct conflict between the National Prohibition Act and this part of section 3450, or any other provision of the old law on which forfeiture by section 3450 depends, remains open."
>
> • • • • • •
>
> "The 're-enactment' made by the Willis-Campbell Act is not of all laws that may have been impliedly repealed by the National Prohibition Act, but only of 'all laws in regard to the manufacture and taxation of and traffic in intoxicating liquors' and 'penalties for violation of such laws.' Only by the broadest construction can section 3450 be brought within this classification."
>
> • • • • • •

"Our conclusion is confirmed—indeed sufficiently supported—by a comparison of the rights of the parties under section 26 and under section 3450, as the latter is construed by the government to reach mere transportation and as it has been interpreted in the Goldsmith Grant case. With reference to the effect upon the same act of the one transporting, there is no difference to him between the two sections; under either he loses every right he has in the vehicle. It is otherwise with reference to the good-faith mortgagee, or title holder. Section 3450 says his rights shall be forfeited; section 26 says they shall not. Could inconsistency be more clearly 'conflict' or 'conflict' more surely 'direct'?"

IV.

Practical administration of justice necessitates forfeiture proceedings under Section 26 N. P. A. instead of R. S. Section 3450.

The policy of this Court in construing statutes is very aptly put in *United States* v. *Katz*, 271 U. S. 354, at page 357, as follows:

> "All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose."

In the dissenting opinion in *Carroll* v. *United States*, 267 U. S. 132, at page 163, it is said:

> "The damnable character of the 'bootlegger's' business should not close our eyes to the mischief

> which will surely follow any attempt to destroy it by unwarranted methods."

From expressions that appear in the District and Circuit Court decisions, it is evident that many of these Courts still regret that Section 3450 is in fact being used to enforce the National Prohibition Act, and not to protect the revenue. Throughout the decisions may be found expressions similar to that which appears in the report of *United States* v. *General Motors Acceptance Corporation* (C. C. A. 5), 25 Fed. (2d) 238, where the court says:

> "Assuming that it is possible to prove that one who uses the vehicle in the removal or for the deposit or concealment of untax-paid liquor has the necessary intent under Section 3450 to defraud the United States of a tax *which existing law neither requires nor permits to be paid* * * *." (Italics ours.)

and such expressions as appear in *United States* v. *One Dodge Coupe* (D. C. Mass.), 34 Fed. (2d) 942, where the court says:

> "In the present case the liquor was outlawed property. To disclose it to government officers would have exposed it not to taxation but to immediate forfeiture."

These Courts have difficulty in accepting the statement which appears in many of the reports of this Court, that "Congress may tax that which is prohibited". They continue to view that tax, as does Mr. Justice Butler, as a penalty; and as was said by Judge Slick in *United States* v. *One Buick Coach Automobile*, 34 Fed. (2d) 318:

> "The whole atmosphere of this case forces the conclusion that the government is attempting to pro-

ceed under an old revenue statute for the very purpose of cutting off the rights of innocent lienholders."

If resort to Section 3450 does not appeal to the spirit of justice, equity and common sense in the judges of so many of our District and Circuit Courts, how can it be expected that the automobile dealers will have respect for a law to enforce which technical advantage is taken of an old revenue statute to the injury of the innocent automobile dealer? In every city, town, hamlet and cross-road of these United States there are automobile dealers. Every one of them, no matter how careful he might be, or how innocent he might be, has his property in jeopardy the same as the petitioner in the case at bar, if the government is to be permitted to construe Section 3450 as applicable to these prohibition cases. During 1929 there were 4,374,923 new automobiles and trucks registered in the various states, and there were 3,655,000 second-hand automobiles registered in the various states, and in about seventy-five per cent of these over 8,000,000 automobiles, the automobile dealer, the finance company and the bank had a very sizable equitable interest. That interest is in constant jeopardy under the constructions which the government makes of its right to use Section 3450.

Regardless of the close differences of opinion in this court and in all of the courts as to the technical distinctions that are made, it cannot be expected that the automobile dealer will accept them and support the enforcement of the prohibition law when the result is to unnecessarily deprive him of his property in the enforcement of that law. It will mean nothing to him to say that this court in *Goldsmith-Grant* v. *United States* has attributed to his automo-

bile a personality and a facility "as an aid to the violation of the law", and to tell him that under the *Ford Coupe* case his automobile has been guilty of concealing liquor to defraud of a tax, which neither he nor the wrongful user of his car can pay, but which tax under *Regal Drug Company* v. *Wardell*, 260 U. S. 386, was previously regarded as a penalty. It may be reassuring for him to know that if the wrongdoer is acquitted of concealing the liquor in the car with intent to defraud of a tax, previous to the proceedings against the car, then the acquittal of the wrongdoer is an acquittal of the car.

Coffey v. *United States*, 116 U. S. 436;

but if proceedings are first had against the car and it is forfeited, and subsequently the wrongdoer is acquitted, then the forfeiture of his car must stand, notwithstanding the acquittal of the wrongdoer, because of the proceedings being separate, one *in personam* and one *in rem*.

Van Oster v. *Kansas*, 272 U. S. 465.

If, however, his car happens to be within the jurisdiction of the Second Circuit, and proceedings are pending against the wrongdoer, then his car cannot be forfeited until those proceedings are concluded.

Commercial Credit Corporation v. *United States* (C. C. A. 2), 18 Fed. (2d) 927;

but if he should happen to be within the jurisdiction of the Fourth Circuit, and proceedings were delayed against the individual until his car was first forfeited, then he would lose his car.

United States v. *Commercial Credit Company* (C. C. A. 4), 20 Fed. (2) 519;

or if his car should have happened to be within the jurisdiction of the Ninth Circuit, then it would have been a matter of serious consequence to the dealer as to whether or not the car happened to be standing still before it started to transport the intoxicating liquor, or whether it was standing still after it had transported the intoxicating liquor, and whether or not, regardless of transportation, the prohibition agent might not have seen the car moving. The dealer must be told that these seemingly inconsequential incidents will either call for an absolute forfeiture of his property under Section 3450, or the protection of his rights under Section 26.

See

United States v. *One Studebaker Coach* (C. C. A. 9), 32 Fed. (2d) 866;

Commercial Credit Company v. *United States*, 33 Fed. (2d) 228;

Davies Motors, Inc. v. *United States*, the case at bar.

Certain it is that the efforts of the President of the United States to encourage respect for law and obedience to law will not receive much assistance from such people as these automobile dealers if in order to enforce the prohibition law, the Government still resorts to this old revenue statute 3450, in utter disregard of the property interests of these innocent dealers in automobiles.

It must be kept in mind that it is only the innocent dealer that is protected under Section 26 of the National

Prohibition Act. The guilty are punished under both acts. But the anomalous result is reached, as in the case at bar, that by proceeding against the wrongdoer and the car under Section 3450 instead of under the National Prohibition Act, the innocent suffer greater punishment than do the guilty. For instance, in the case at bar, the guilty transporter or concealer of the liquor was fined $250. The innocent automobile dealer has lost his investment of over $800. That results because the forfeiture proceedings under Section 3450 forfeit absolutely all the rights of the innocent in the automobile, notwithstanding their value, whereas punishment of the individual under that section is limited to a fine or penalty of not more than $500. Procedure under this section encourages violation of the law. A wrongdoer will know that if he can only secure some finance company or innocent dealer to carry the largest equitable interest in the car, then it is the innocent dealer or finance company who will suffer the most, and he, the wrongdoer, can take his chances on a fine not exceeding $500.

Continued forfeitures under Section 3450 are going to aggravate the blocking of the court dockets, which is already a serious problem. These dealers have a right to insist upon a jury trial in each of these forfeiture cases, and they have a further right to insist that the government must prove actual intent to defraud of a tax, before a forfeiture can take place.

See

United States v. *One Dodge Coupe* (D. C. Mass.) 34 Fed. (2d) 942;

United States v. *One Buick Coach* (N. D. Ind.) 34 Fed. (2d) 318;

United States v. *One 6-Ton Wichita Motor Truck, etc.* (S. D. N. Y.), 37 Fed. (2d) 617.

They will be forced to resort to such proceedings in order to protect their rights under the law, if this court holds that Section 3450 is the applicable statute.

From an analysis of these cases we therefore learn that by prosecutions under 3450 it is possible for the innocent to be punished, while the guilty escape, under the doctrine laid down by this court in *Van Oster* v. *Kansas*, 272 U. S. 465, and by the Fourth Circuit in *United States* v. *Commercial Credit Company*, 20 Fed. (2d) 519; and in any event the innocent are punished more than the guilty, under the very provisions of the statute itself, where their rights are absolutely forfeited, and the wrongdoer is limited to a fine of $500. Since the National Prohibition Act sufficiently provides for its own punishments, and the protection of the innocent parties, that act should be respected and alone enforced, and should not need the aid of forfeitures under Section 3450.

To hold that forfeitures must be under Section 26 of the National Prohibition Act instead of under Section 3450 will in no way embarrass the government under its customs seizures, as the Solicitor General urged before the court in the other cases. The Tariff Act of 1922 with respect to customs was enacted after the National Prohibition Act, and after the Willis-Campbell Act, and supersedes any previously enacted prohibition statutes, so that the holding that Section 26 must be applied in connection with cars used to transport liquor into the United States would not control with respect to customs seizures.

See

Charles Zimmerman Sons Company v. *Ferguson* (E. D. Mich.), 16 Fed. (2d) 604;
United States v. *Cardwell*, 9 Fed. (2d) 146.

Furthermore, transportation under Section 26 of the National Prohibition Act refers only to acts within the boundaries of the United States, and not to smuggling across the border.

Accordingly it is submitted that the practical administration of justice requires forfeitures under Section 26 instead of R. S. 3450.

V.

Summary of previous arguments on penalties versus taxes in view of new tax law.

In view of the fact that the present Revenue Act of 1926, placing a tax of $6.40 on each gallon and reading practically the same as the statute which was considered by this court in *Regal Drug Company* v. *United States*, differs from the Act of 1921 which placed a tax of $2.20 on non beverage, with an additional tax of $4.20 when diverted to beverage purposes, and which later tax law was considered by this court in the *Ford Coupe* case, it may be possible that the court will want to reconsider the question of taxes versus penalties in the *Ford Coupe* case. As the *Ford Coupe* case now stands, it runs squarely contra to the previous decisions of this court in *Regal Drug Company* v. *United States*, as is pointed out by Mr. Justice Butler in his dissenting opinion, and it is so now, particularly in view of the change in the language of the tax law.

Accordingly for the information of the court a summary of the brief on that point, filed at the re-argument of the *Ford Coupe* case, is herewith given.

1. The nature and character of the revenue laws, particularly Section 3450 Revised Statutes, insofar as they relate to beverage liquors, were changed upon the adoption of National Prohibition Act, so that the laws originally intended to protect revenue (taxes) by the change became laws in aid of prohibition (penalties).

See

Fontenot v. *Accardo*, 278 Federal 871;
Regal Drug Company v. *Wardell*, 260 U. S. 386.

2. Congress intended the revenue laws as penalties only upon a prohibited business and not upon a lawful ownership of innocent conditional vendors and mortgagees of automobiles. This is evidenced by the use of the words "diverted" and "diversion" in 26 U. S. C. A. 245, (4), and by the machinery set up in the National Prohibition Act for its own enforcement. Congress did not intend to confiscate the property of innocent parties, as is shown by Section 26 of the National Prohibition Act.

3. The dictum in *United States* v. *Yuginovich*, 256 U. S. 450, that Congress may under the broad authority of the taxing power tax that which is prohibited is not supported by the authorities cited therein. *License Tax Cases*, 5 Wallace (72 U. S.) 462; *In re Kollock*, 165 U. S. 526; *United States* v. *Jim Fuey Moy*, 241 U. S. 394; *United States* v. *Doremus*, 249 U. S. 86, as analyzed, show them to be in support of revenue measures and not penal statutes.

4. The revenue feature has always been the controlling influence to determine whether a statute is a tax measure, and according to eminent authority should be the only influence in determining if there is a tax in fact.

D. A. Wells—*Theory and Practice of Taxation;*
Cooley on *Constitutional Limitations;*
John Randolph Tucker—*Constitution of the United States;*
Story—*Commentaries on the Constitution.*

5. The framers of the Constitution intended that the taxing power should be used for purposes of revenue only.

Jefferson's Correspondence, Vol. 4;
The Federalist.

6. The power to make money exactions as regulatory measures, such as in *Veazie Bank* v. *Fenno,* 8 Wallace (77 U. S.) 533, is to be found in the implied authority of the specific general powers given to Congress, and not in the taxing power.

Head Money Cases, 112 U. S. 580;
Cooley on Taxation;
Taxation for the Purpose of Destruction, by J. B. Waite, 6 Michigan Law Review 277;
The National Police Power under the Taxing Clause of the Constitution, by R. E. Cushman, 4 Minn. Law Review 247;
Indirect Encroachment on the Federal Authority by the Taxing Powers of the States, by Thomas R. Powell, 31 Harvard Law Review 321;
Is there a National Police Power? by Paul Fuller, 4 Columbia Law Review 563;
Covert Legislation and the Constitution, by Judge Charles M. Hough, 30 Harvard Law Review 801.

7. Where private property is taken solely as a punishment, it is under the penal power as distinguished from the taxing power of the Government.

See

Seligman—*Essays in Taxation;*
The King v. *Barger* (Australian Case), 6 Commonwealth L. R. 41;
Child Labor Tax Case, 259 U. S. 20;
Trusler v. *Crooks,* 70 Law Ed. 198, 269 U. S. 475;

and as a penalty if enforced against innocent parties without due process of law, it is a violation of the Fifth Amendment.

Regal Drug Co. v. *Wardell,* 260 U. S. 386;
Lipke v. *Lederer,* 259 U. S. 557.

VI.

Interpreting Section 26 as mandatory aids and does not retard prohibition enforcement.

Congress recognized that in our great social experiment of prohibition it was dangerous to go counter to reason and justice. Accordingly in Section 26 it safeguarded the innocent from the deodand theory used by the courts in forfeitures under Section 3450 to support the public revenue.

The guilty are punished under the Prohibition Act more severely than they are under R. S. 3450, but the opposite is true as to the innocent Why, then, should not the car be prosecuted under Section 26 so as to protect the innocent, instead of under Section 3450, where the only re-

sult is to confiscate property of the innocent? Extending the "deodand" theory—the giving of a personality to a thing—beyond the revenue statutes, and using it in fact, if not in theory, in support of prohibition is filled with great danger.

We believe that this court should give serious consideration to the efforts of Congress under Section 26 to protect the innocent.

Respectfully,

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No. 569

In the Supreme Court of the United States

OCTOBER TERM, 1929

DAVIES MOTORS, INC., A CORPORATION, CLAIMANT OF ONE WILLYS-KNIGHT ROADSTER AUTOMOBILE, ENGINE #27-260, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 569

DAVIES MOTORS, INC., A CORPORATION, CLAIMANT OF One Willys-Knight Roadster Automobile, Engine #27-260, petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The Government does not oppose the petition for certiorari in this case.

The question involved is the same as that in No. 452, *Richbourg Motor Co.* v. *United States,* now pending before this Court on writ of certiorari granted December 2, 1929, namely, whether a proceeding for forfeiture of an automobile used for the illegal transportation of intoxicating liquor must be governed by the provisions of Section 26, Title II, of the National Prohibition Act, if a complaint has been sworn out charging the occupant of the automobile with unlawful possession and transpor-

tation of liquor, or whether under such circumstances the automobile may be proceeded against and forfeited under the provisions of Section 3450, Revised Statutes, for the deposit and concealment therein of intoxicating liquor with intent to defraud the Government of the taxes thereon.

The facts in the two cases are substantially the same. As in the *Richbourg Motor Company case*, there was here a seizure by a Federal prohibition agent of an automobile used in the illegal transportion of liquor and an arrest of the person in charge thereof for transportation and possession in violation of the National Prohibition Act upon a complaint filed before a United States Commissioner. No further proceedings appear to have been taken under that Act. Subsequently, an information was filed charging the person in possession of the car and the liquor with a violation of the criminal provisions of Section 3450, Revised Statutes, to which he pleaded guilty and was fined. A libel against the car seeking its forfeiture under Section 3450, Revised Statutes, was filed on the ground that it had been used in the deposit and concealment of distilled spirits with intent to defraud the Government of the taxes thereon. The petitioner, Davies Motors, Inc., intervened in these proceedings, claiming title to the car under a contract of conditional sale.

In affirming the decree of forfeiture, the court below reviewed the decisions of the Circuit Court of Appeals for the Fourth Circuit in the *Rich-*

bourg Motor Company case and other cases in that Circuit upholding forfeitures under Section 3450 upon a similar state of facts, as well as the decision of the Circuit Court of Appeals for the Fifth Circuit in *United States* v. *General Motors Acceptance Corporation*, 25 F. (2d) 238, where the opposite conclusion was reached, and held that it was disposed to follow the decisions and line of reasoning of the Circuit Court of Appeals for the Fourth Circuit.

In the *Richbourg Motor Company case* the Government contended that the decision was correct, but in view of the conflict of decisions involved, and because the case presented questions constantly arising in the enforcement of prohibition, it did not oppose the petition for certiorari.

As the petition in that case has been granted and the case is now pending before the Court, and since the instant case presents substantially the same facts and involves the same questions, the Government does not oppose the petition.

Respectfully submitted.

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JANUARY, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

SUPREME COURT OF THE UNITED STATES.

Nos. 452 and 569.—October Term, 1929.

Richbourg Motor Company, Intervenor, Petitioner, 452 *vs.* The United States.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.
Davies Motors, Inc., Petitioner, 569 *vs.* The United States.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[May 19, 1930.]

Mr. Justice Stone delivered the opinion of the Court.

In these cases certiorari was granted, 280 U. S. —, and 281 U. S. —, respectively, to pass on the question, whether proceedings for the forfeiture of a vehicle seized under § 26 of the National Prohibition Act[1], as one used for unlawful transportation of intoxicating

[1]Section 26, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 315 (U. S. C., Title 27, Sec. 40):

"When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or aircraft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of

liquor, but where there has been no prosecution for that offense, must be had under that section, or whether they may be prosecuted under the provisions of R. S. § 3450[2]. The latter authorizes the forfeiture of vehicles used in the removal or concealment of any commodity with intent to deprive the United States of any tax upon it, which is made a criminal offense. The section does not, as does § 26, protect the interests of innocent lienors. *Goldsmith Grant Co.* v. *United States,* 254 U. S. 505; cf. *Van Oster* v. *Kansas,* 272 U. S. 465.

In each case the Court of Appeals answered the question by affirming a judgment of a district court, forfeiting, under § 3450, automobiles in which the petitioners, respectively, asserted an interest as innocent lienors. *Richbourg Motor Co.* v. *United States* (4th Circuit), 34 F. (2d) 38; *Davies Motor Co.* v. *United States* (9th Circuit), 35 F. (2d) 928. In each a person operating an automobile belonging to another was arrested and arraigned before a

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the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. . . ."

[2]Section 3450, Revised Statutes (U. S. C., Title 26, Sec. 1181):

"Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States or such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited. And every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than five hundred dollars. . . ."

United States Commissioner on a charge of illegal transportation of intoxicating liquor. The liquor and the car used for its transportation were seized by the officer making the arrest. The United States Attorney did not proceed with the prosecution of the charge, but procured the indictment and conviction of the prisoners, under § 3450, for removing and concealing spirits with intent to defraud the government of the tax.

The proceedings presently involved for the forfeiture of the vehicles were also had under that section. In each the respective petitioners intervened, setting up that they were lienors under conditional contracts of sale, to persons other than those arrested, and that petitioners and the conditional vendees were innocent of any participation in the unlawful acts charged. In No. 452 the court refused a request of petitioner to submit to the jury the question whether the seized automobile was used in the unlawful transportation of liquor and whether the persons in the car were arrested at the time of its seizure, and refused a motion to dismiss the libel on the ground that by such arrest and seizure the government was bound to proceed for the forfeiture of the vehicle under § 26, and barred from proceeding under § 3450. In No. 569 trial was by the court without a jury, which found the facts as already stated, and decreed forfeiture of the vehicle under § 3450.

By § 5 of the Willis-Campbell Act of November 23, 1921, c. 134, 42 Stat. 222, 223, all laws relating to the manufacture, taxation and traffic in intoxicating liquors and penalties for their violation, in force when the National Prohibition Act was adopted, were continued in force except such provisions as are "directly in conflict with any provision of the National Prohibition Act".

In *United States* v. *One Ford Coupe*, 272 U. S. 321, it was held that there was no such direct conflict between § 26 and § 3450 as to preclude the forfeiture of the interest of an innocent lienor under the latter, where the intoxicating liquor was concealed in the seized vehicle with intent to defraud the government of the tax, and where it did not appear that there was transportation of the liquor. In *Port Gardner Investment Co.* v. *United States*, 272 U. S. 564, and in *Commercial Credit Co.* v. *United States*, 276 U. S. 226, it was held that prosecution and conviction of the offender for the transportation of intoxicating liquor under the Prohibition Act, barred forfeiture of the seized vehicle under § 3450, since the

disposition of the vehicle after the conviction, prescribed by § 26, is mandatory. These cases left undetermined the question now presented, whether, under § 26, the mere arrest of the person discovered in the act of transportation, and the seizure of the transporting vehicle, bar the forfeiture under § 3450.

The language of § 26 is in form mandatory throughout. It is made the "duty" of the officer discovering any person in the act of transporting liquor to seize the liquor, when "he shall take possession of the vehicle" and "shall arrest any person in charge" of it. He "shall at once proceed against the person arrested under the provisions of this title". The vehicle "shall be returned to the owner" upon his giving bond. "The court upon conviction of the person so arrested . . . shall order a sale by public auction of the property seized" and the officer making the sale "shall pay all liens which are established . . . as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor. . . ." It is plain that, whenever the vehicle seized by the arresting officers is discovered in use in the prohibited transportation, literal compliance with these requirements would compel the forfeiture under § 26, with the consequent protection of the interests of innocent lienors. To that extent, § 26, if interpreted to exact such compliance, is in direct conflict with the forfeiture provisions of § 3450 and supersedes them whenever any person within the provisions of § 26 is discovered "in the act of transporting . . . intoxicating liquors in any . . . vehicle," which liquor is "removed . . . deposited or concealed . . . with intent to defraud the United States" of the tax.

But the government contends that § 26 is not to be read thus literally; that it was not intended by its mandatory phrases to do more than state generally the duty resting on all law enforcement officers to enforce the law, but which leaves them free, when the same act or transaction constitutes an offense under different statutes, to proceed under either one. It is argued that § 26 could not have been intended to preclude district attorneys from prosecuting violations of § 3450 merely because they involve transportation, and it can no less be taken to deprive them of their election to forfeit the offending vehicle under either section.

Undoubtedly, "shall" is sometimes the equivalent of "may" when used in a statute prospectively affecting government action. See *Railroad* v. *Hecht*, 95 U. S. 168; *West Wisconsin Ry. Co.* v. *Foley*, 94 U. S. 100, 103. The usual provisions of criminal statutes that the offender "shall" be punished as the statute prescribes is not necessarily to be taken, as against the government, to direct prosecution under that rather than some other applicable statute.

But the prescription in detail, by § 26, whenever transportation is involved, of successive steps to be taken which, if followed, lead unavoidably to forfeiture under that section and no other, with the important consequence of protecting the interests of innocent third persons, suggests a definite purpose to make the protection effective by bringing all forfeitures in such cases under its controlling provisions. If the purpose were the more general one of imposing on government officers the general duty to procure the forfeiture at their election, either under § 26 or any other applicable statute, most of the requirements of § 26 might have been omitted. The end sought could have been attained more easily by the simple enactment, in the language of § 3450, that the offending vehicle "shall be forfeited", saving the rights of innocent lienors if the proceeding were had under § 26.

It is to be observed that § 26 neither prohibits transportation of intoxicating liquors nor prescribes the punishment of the offender. That is provided for in §§ 3 and 29, as amended by the Jones Act (45 Stat. 1446). The general duty of investigating and reporting violations of § 3, as well as other sections of the National Prohibition Act, to United States Attorneys, is imposed on all prohibition officers by §§ 2 and 29. That duty is mandatory. *Donelly* v. *United States*, 276 U. S. 505. The general duty to prosecute all criminal offenses is imposed on district attorneys by R. S. § 777. The objective of § 26 is not the prosecution of the offender, elsewhere provided for, but the confiscation of the seized liquor and the forfeiture of vehicles used in its transportation, to the limited extent specified in the section. Every act which it enjoins on public officials is directed to that end.

In providing for forfeitures under this section, Congress was not unaware that the enactment of the National Prohibition Act would enormously increase seizures of vehicles, beyond those made under § 3450, and that their forfeiture would place an increased

and heavy burden on many innocent persons, unless afforded some protection by the new legislation. By § 26 it gave such protection in all cases where the prosecution of the person guilty of the transportation is had under the National Prohibition Act. This would have been but an idle gesture and the Congressional purpose would have been defeated if, in practically every case where the transporting vehicle is seized the prosecuting officers could compel forfeiture of the interests of innocent third persons under § 3450. Yet, that is the effect of the construction of § 26 contended for by the government, since, with the enactment of national prohibition, there can be few cases of illegal transportation which do not involve the concealment of non-tax-paid liquor. See *One Ford Coupe* v. *United States, supra,* p. 326.

We think that Congress did not take the precaution to enact the carefully chosen language of § 26 merely to impose general duties on prosecuting officers already placed on them by other sections of the Act, but that its purpose was to preclude the nullification of the protection which § 26 had extended to innocent third persons.

This Court has already held that the provision in § 26 that "The court, upon the conviction of the person so arrested, shall . . . order a sale by public auction of the property seized" is mandatory and requires the forfeiture to proceed under that section. *Port Gardner Investment Co.* v. *United States, supra; Commercial Credit Co.* v. *United States, supra.* No tenable ground of distinction is suggested which would enable us to say, where forfeiture is involved, that the preceding requirement of the section, that the proceedings against the person arrested "shall be under the provisions of this title," is any less so.

The conclusion we reach is not without support in the legislative history of § 26. The clause protecting the interests of innocent lienors was added by amendment in the House of Representatives to H. R. 6810, which became the National Prohibition Act. The sponsor for the amendment pointed out that the procedure prescribed by the section as originally drawn protected the interests of the innocent owner and stated that the amendment was designed to save from forfeiture the interests of innocent lienors and innocent owners alike. Congressional Record, 66th Cong., 1st Sess., Vol. 58, Pt. 3, p. 2902, July 19, 1919.

Report No. 151 of the Senate Judiciary Committee on this bill, August 18, 1919, 66th Cong., 1st Sess., stated that the "seizure of any vehicle in which liquor is being transported in violation of law, together with liquor being transported, is authorized, as well as the arrest of the person engaged in such illegal transaction, the property seized to be disposed of under the direction of the court, as provided in § 26".

We are of opinion that under § 26 it is the duty of prohibition officers to arrest any person discovered in the act of transportation and to seize the transporting vehicle; that such arrest and seizure require the government to proceed for forfeiture of the vehicle under § 26. It is unnecessary to say whether, if for any reason the seizure cannot be made or the forfeiture proceeded with, prosecution for any offense committed must be had under the National Prohibition Act rather than other statutory provisions.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.